

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:

SHADY GROVE INVESTORS I, LLC AND
SHADY GROVE INVESTORS II, LLC,
Applicants

Alfred Blumberg
John Clapsaddle
Glenn Cook
Steven Gang
Bruce Lane

For the Application

Scott Wallace, Esquire

Attorney for the Applicant

Before: Françoise M. Carrier, Hearing Examiner

Zoning Application No. G-841

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. SUMMARY

The present application seeks to rezone 6.9 acres of land at the intersection of Omega Drive and Research Boulevard in the Gaithersburg area, half a mile southwest of the junction between I-270 and Shady Grove Road, from the C-2 Zone to the PD-44 Zone. The property consists of two largely undeveloped lots within the Shady Grove Executive Park, an office park with five buildings, four to six stories in height, containing approximately 700,000 square feet of space, plus an extended-stay hotel. The Applicant proposes to build 371 dwelling units on the site in three multi-family residential buildings on the subject property, four to six stories in height.

The central issue in this case is master plan compliance. The PD Zone cannot be applied unless the District Council simultaneously approves a Development Plan that meets the requirements of the Zoning Ordinance. These include a finding that the proposed development substantially complies with the use and density indicated in the applicable master plan. Moreover, the purpose clause of the PD Zone requires substantial compliance with the Master Plan.

When the *Shady Grove Study Area Master Plan* was adopted in 1990, the subject property was part of a recently-approved office park, and was expected to be developed for office use. Accordingly, on every map in the Master Plan that depicts the subject property, it is recommended for office use. The Applicant makes three basic arguments, all with the support of the Planning Board and Technical Staff:

(1) The proposed development should be considered to substantially comply with the Master Plan because it would be consistent with some of its objectives, including increasing the County's housing stock and providing housing near employment centers and transit.

(2) The proposed development complies with the use recommended in the Master Plan because the recommended zoning for the site is C-2, and the C-2 Zone was amended, four years after adoption of the Master Plan, to permit dwellings as a special exception.

(3) The proposed development substantially complies with the Master Plan's density recommendation for the site because, although the Master Plan does not provide a

residential density recommendation, the Development Plan would limit building density to the maximum Floor Area Ratio (the measure of density commonly used for commercial development) permitted in the C-2 Zone.

The Applicant, the Planning Board and Technical Staff derive support for their positions from a decision of the District Council in a 2003 zoning case, LMA No. G-803, in which commercial density was roughly translated into residential density to allow approval of an application for reclassification to the PD Zone. As stated in Part V.A.(a)5. below, in the present case, where the issue was squarely raised by Technical Staff and the Planning Board, after a closer examination of the question, the Hearing Examiner has concluded that the better rule would be that the PD Zone may be applied only to land that is recommended for residential use in the applicable master plan, with a recommended residential density of two dwelling units per acre or more.

The Hearing Examiner concludes that while the proposed development would be consistent with some of the Master Plan's goals, and with the current planning vision for the area espoused by the Planning Board and Technical Staff, the record does not support the required finding of substantial compliance with the use and density indicated in the Master Plan. The Master Plan did not recommend the subject property for residential use. The Hearing Examiner finds the effort to apply a later-adopted special exception unpersuasive, given that the drafters of the Master Plan, as well as the District Council and the Planning Board in approving and adopting it, never contemplated either the "Dwellings" special exception or possible residential use of the subject site. Moreover, even if the special exception were considered to give the site a Master Plan recommendation for residential use, the special exception permits a maximum density equal to less than half of the density proposed in this application.

The proposed development has a great deal of appeal, and both the Planning Board and Technical Staff favor it. Based on the specific requirements of the Zoning Ordinance for approval of a Development Plan, however, the Hearing Examiner concludes that the application should be denied.

II. STATEMENT OF THE CASE

Application No. G-841, filed on October 6, 2005 by Applicants Shady Grove Investors I, L.L.C. and Shady Grove Investors II, L.L.C., requests reclassification from the C-2 Zone (general commercial) to the PD-44 Zone (Planned Development) of 6.92 acres of land located north and east of the intersection of Research Boulevard and Omega Drive, in the 9th Election District.

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("MNCPPC") who, in a report dated April 28, 2006, recommended *approval*.¹ The Montgomery County Planning Board ("Planning Board") considered the application on May 18, 2006 and recommended *approval* by a vote of 4 to 1. A public hearing was conducted on May 30, 2006, at which testimony and evidence were presented in support of the application. No opposition was presented at the hearing, although the record includes one letter in opposition. The record was held open to receive supplemental submissions from the Applicant and closed on June 26, 2006.

III. FINDINGS OF FACT

For the convenience of the reader, the findings of fact are grouped by subject matter. Where there are conflicts in the evidence, these conflicts are resolved under the preponderance of the evidence test.

A. Subject Property

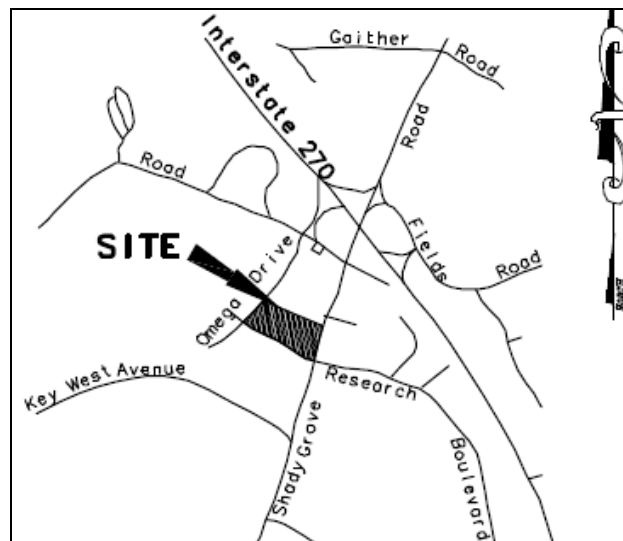
The subject property consists of approximately 6.9 acres of land located north and east of the intersection of Research Boulevard and Omega Drive. The property is comprised of two largely undeveloped lots within the footprint of the Shady Grove Executive Park, an office park located just south of the intersection of I-270 and Shady Grove Road.² The lots are identified as

¹ The Staff Report is liberally paraphrased and quoted in Part II of this report.

² The subject site and the Office Park were originally under a single ownership. The Applicant has since sold the office buildings and the hotel, and now owns only the subject property.

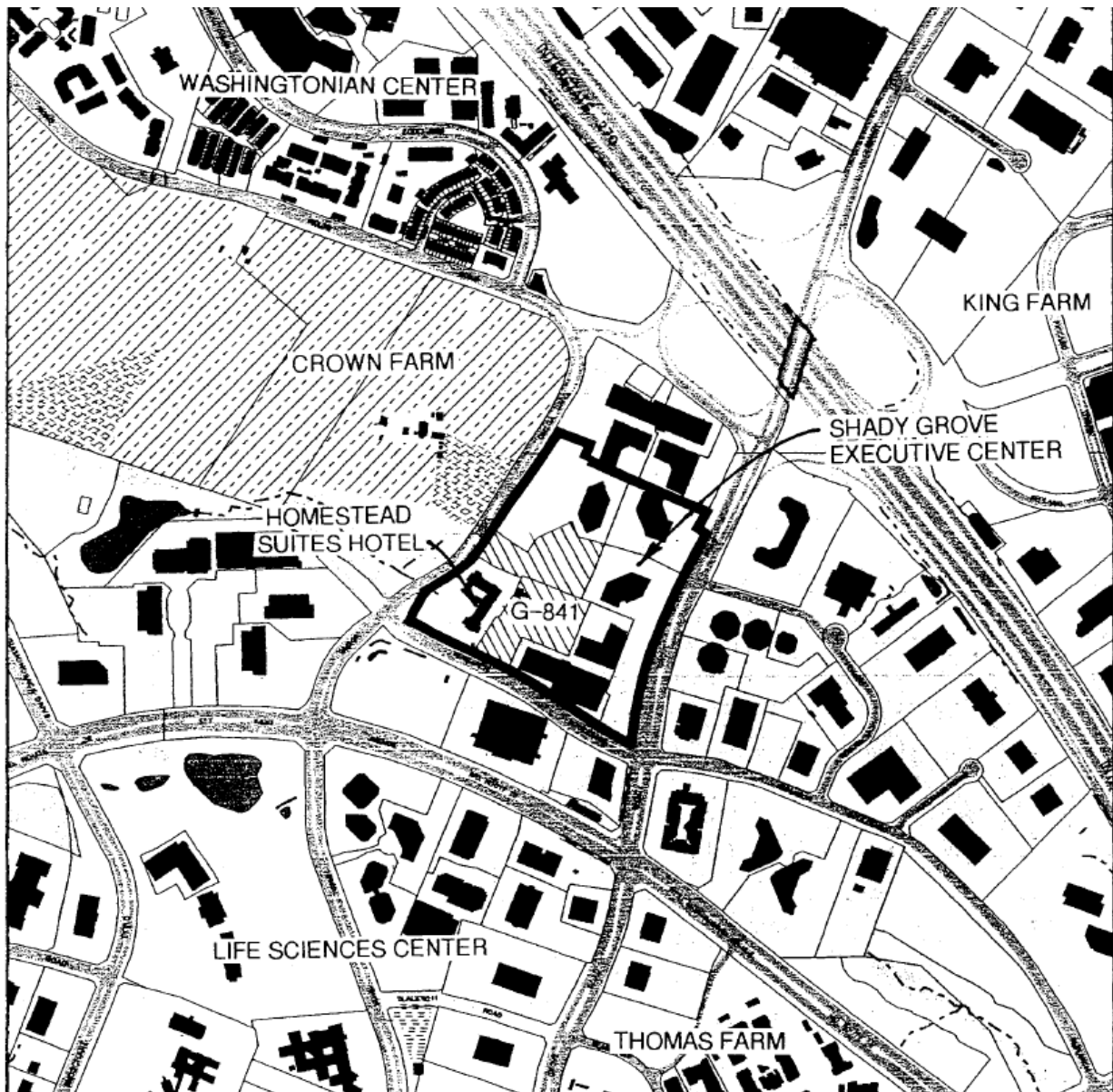
Parcel T-T, Decoverly Hall on Plat No. 22312 (3.59 acres) and Parcel R-R, Decoverly Hall on Plat No. 20811 (3.32 acres). The Shady Grove Executive Park (the “Office Park”) consists of a total of 42 acres and has Preliminary Plan approval for approximately 920,000 square feet of office space and a 135-unit hotel. To date, 710,000 square feet of office space has been constructed in six buildings ranging from four to six stories in height. The Office Park also includes parking structures and a Homestead Suites Hotel, as well as extensive landscaping, outdoor seating areas, and interconnected internal roadways and sidewalks. The existing Preliminary Plan approval would permit an additional 210,000 square feet of commercial development.

The general shape and location of the subject property are shown on the map that follows (excerpted from Ex. 50(a)).



As shown on the map on the next page, the property has an irregular shape. It abuts office buildings within the Office Park to the north and east. To the west, the subject property wraps around the extended-stay Homewood Suites Hotel at the corner of Omega Drive and Research Boulevard, and it has frontage on both of those roadways (214 feet of frontage on Research Boulevard, and 145 feet on Omega Drive). To the south, it wraps around a 3-story parking structure that serves an adjacent office building and would also provide parking for Building One of the proposed development.

Vicinity Map, from Ex. 19(e)



The property is gently sloping, with large grassy areas, scattered trees and a small forested area, measuring approximately 0.41 acres, near Research Boulevard. The forested area was placed in a conservation easement in connection with the development of the Office Park, and would be preserved and expanded as part of the proposed development. The only existing building on the subject property is a small, abandoned drive-through bank that would be razed to make room for the proposed development. In addition, a small portion of a surface parking lot serving one of the existing office buildings spills over onto the subject property near Omega Drive. Two

entrances to the Office Park are located on the subject property, one extending east/west from Omega Drive and the other extending north/south from Research Boulevard. A third entrance drive connects to Corporate Boulevard, the major entrance drive to the Office Park from Shady Grove, but this third drive is not located on the subject property.

The photographs below depict current conditions of the subject site and the surrounding Office Park.

**Subject Site, Looking East from Omega Drive into the Site
From Ex. 38, Site Pictures View 1**



**Subject Site, Looking South Towards Parking Garage for Building One
From Ex. 38, Site Pictures View 4**



Existing Office Park Buildings, from Ex. 38, Existing Buildings Pictures Top Row**Existing Streetscape, from Ex. 38, Streetscape Pictures Top Row****B. Surrounding Area**

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition

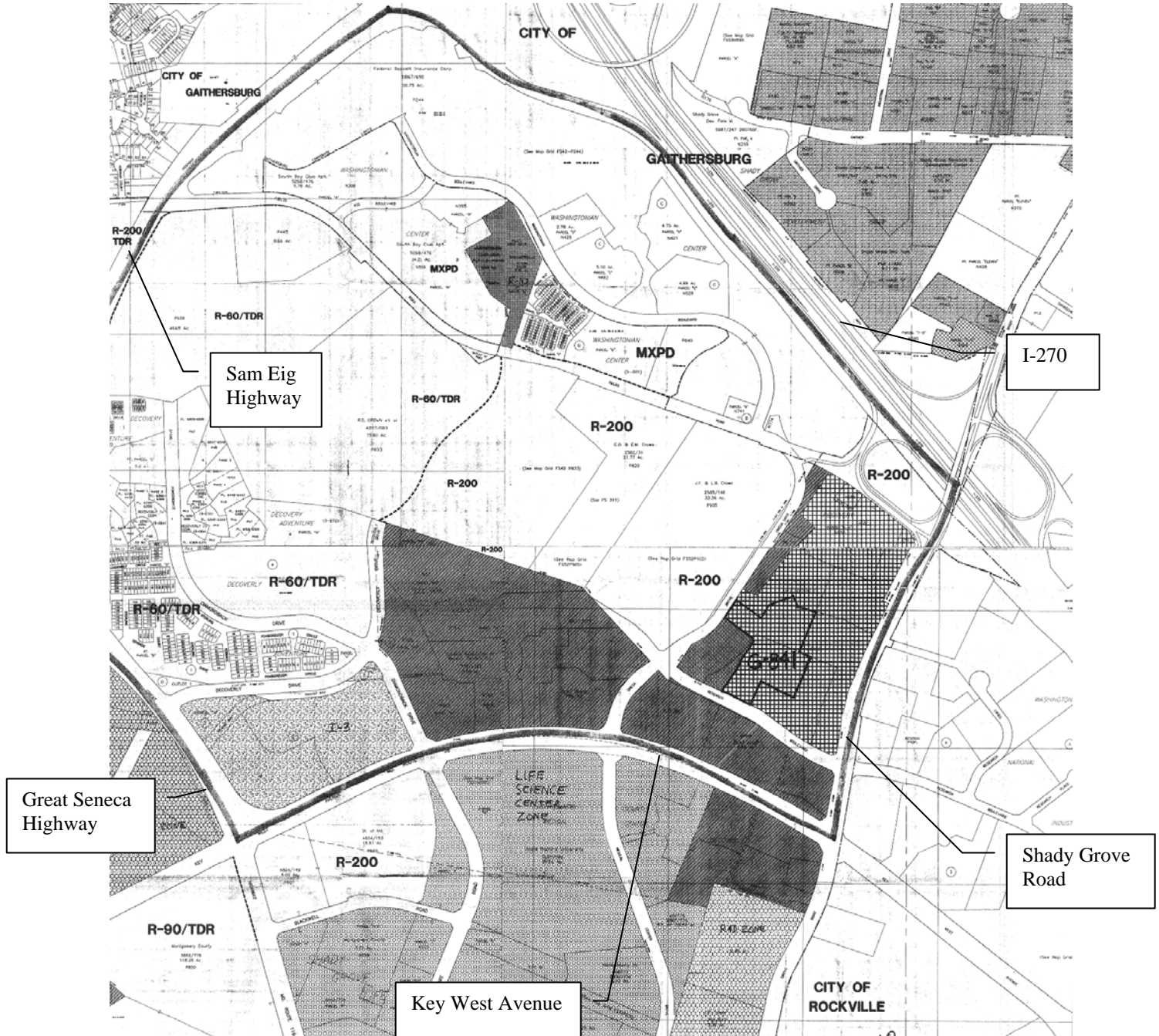
of the surrounding area takes into account those areas that would be most directly affected by the proposed development.

In the present case, Technical Staff described the surrounding area as bounded roughly by Fields Road and the I-270 interchange to the north, Shady Grove Road to the east, Key West Avenue to the south, and those parcels of land fronting along the west side of Omega Drive to the west. See Staff Report, Ex. 26 at 3. Staff's recommended surrounding area is shown on the next page.

Applicant's land planner, Al Blumberg, considered a broader surrounding area to be more appropriate, bounded roughly by I-270 to the north, Shady Grove Road to the east, Key West Avenue to the south, and Seneca Highway and Sam Eig Highway to the west. This area, shown on the zoning map on the next page, includes the Washingtonian Center and the Crown Farm property, which Mr. Blumberg considers to have a relationship to the subject property. He notes that the Washingtonian Center, a commercial center with a variety of retail, entertainment and restaurant uses, is located about half a mile (a 10- to 15-minute walk) from the subject property. The Crown Farm property, a very large, vacant tract that is currently the subject of a major development proposal including annexation into the City of Gaithersburg, is located about 100 feet from the subject site, across Omega Drive.

The Hearing Examiner finds Mr. Blumberg's reasoning persuasive concerning the relationship of the subject site with the Crown Farm and the Washingtonian Center. Due to its relatively modest size, the development proposed in this case would likely be affected by the Washingtonian Center and the development of the Crown Farm more than it would affect those larger developments. However, there is clearly a relationship between these uses, and all should be considered in evaluating compatibility. Accordingly, the Hearing Examiner adopts as the surrounding area for this application the surrounding area suggested by Mr. Blumberg, as shown on the next page.

Zoning Map with Surrounding Area, Ex. 48



The surrounding area contains a mix of uses including the Office Park in the C-2 and O-M Zones; the hotel noted earlier, in the H-M Zone; the Decoverly Industrial Park in the O-M Zone; the Washingtonian Center, a major retail-restaurant-entertainment center in the City of Gaithersburg; and the 180-acre Crown Farm, which is currently classified under the R-200 Zone but has been approved by the District Council for annexation into the City of Gaithersburg. Technical

Staff indicates that Gaithersburg intends to apply a mixed-use zoning category to the property, while Applicant's land planner testified that the property is proposed for 2,000 residential units and 300,000 square feet of commercial development. Significant land uses beyond the defined surrounding area include the Shady Grove Life Sciences Center and the King Farm subdivision. A transit way was proposed in the applicable Master Plan for a location on Omega Drive, about 1,000 feet from the subject property, a short walk away. Under the current plans for the Crown Farm property, however, the transit station is shown about 2,000 feet from the subject property (about one-third of a mile away).

The aerial photograph below shows the relationship of the subject property to existing and planned land uses in the surrounding area.

Aerial Photograph, from Ex. 38



C. Zoning History

The subject property was classified under the R-200 Zone in the 1958 Comprehensive Zoning. It was reclassified to the C-2 Zone by Local Map Amendment (G-208) in 1980. C-2 zoning was reconfirmed by Sectional Map Amendment (G-502) in 1986.

D. Proposed Development

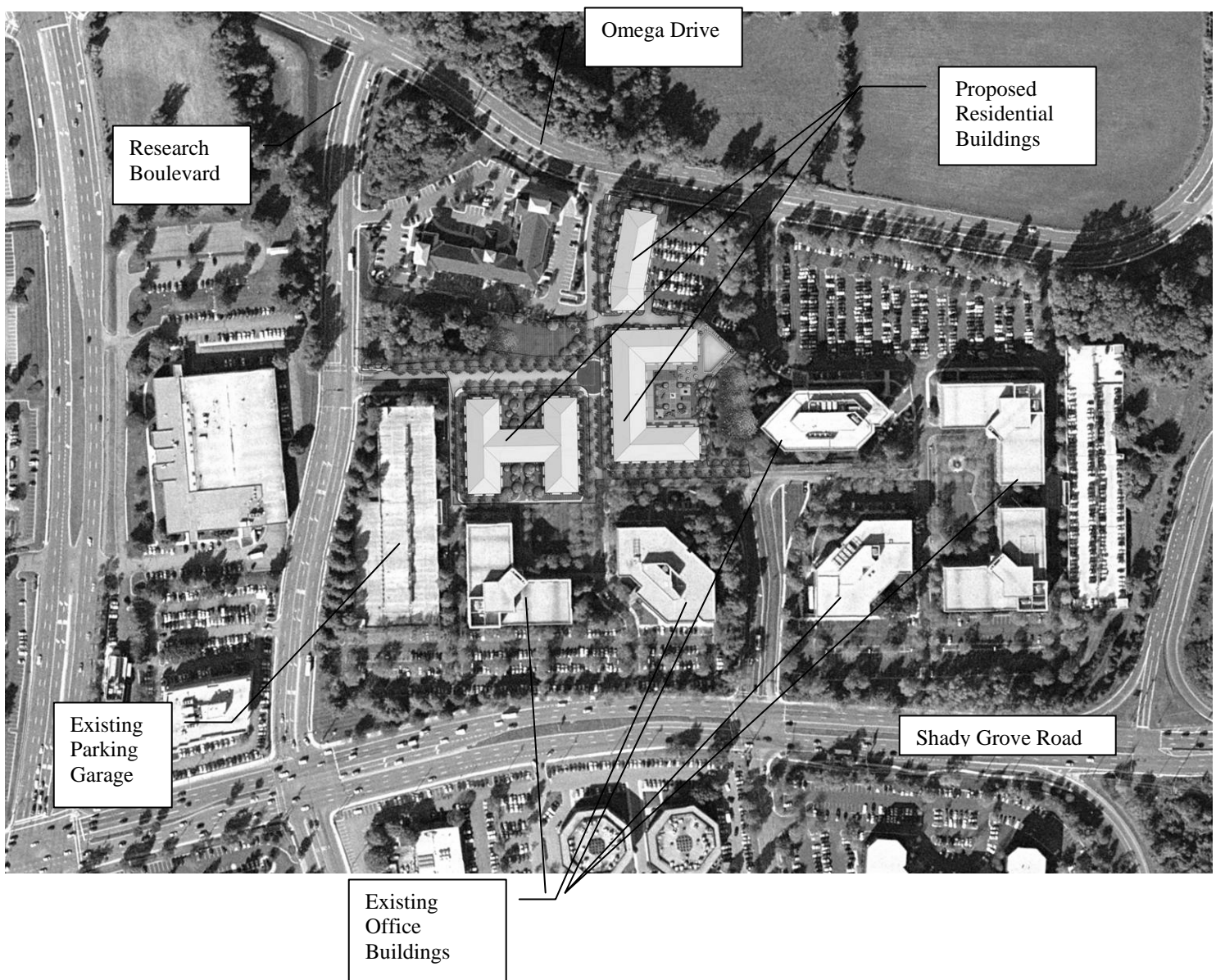
Applicant seeks rezoning to the PD-44 Zone to permit construction of three multi-family residential buildings with a total of no more than 371 dwelling units, including 15 percent moderately priced dwelling units (MDPUs) on site. Building One is shown on the Development Plan with an existing office building to the east, proposed residential Building Two to the north, an open area and small forested area to the west, and a parking garage to the south. Parking for residents of Building One would be provided through a dedicated portion of this parking garage. Testimony demonstrated that the capacity of this garage, which was sized to accommodate an office building on the location now proposed for Building One, would be more than adequate for the use proposed. Building One is shown on the Development Plan about 70 feet from the garage, which the evidence indicated is in keeping with current building trends. See Ex. 51. Testimony suggested that a double row of trees is planned between Building One and the garage, as a buffer.

Building Three is shown on the Development Plan adjacent to Omega Drive, with the extended-stay hotel to the south, a large surface parking lot serving a nearby office building to the north, Proposed Building Two to the east and a small open space caddy-corner to the south. Building Two is shown on the Development Plan in the center of the site, directly east of Building Three and north of Building One, with the hotel and a small open space caddy-corner to the west, and another small open space to the east, followed by existing office buildings beyond. Parking for Buildings Two and Three would be provided in an underground garage located beneath Building

Two. The entrance would be between Buildings Two and Three. In addition, Building Three would have a very small number of surface parking spaces.³

The relationships of the proposed residential buildings to the adjacent hotel and office buildings are shown on the contextual site plan below, which simulates how the new buildings would fit into their surroundings.

Contextual Site Plan Illustration, from Ex. 38

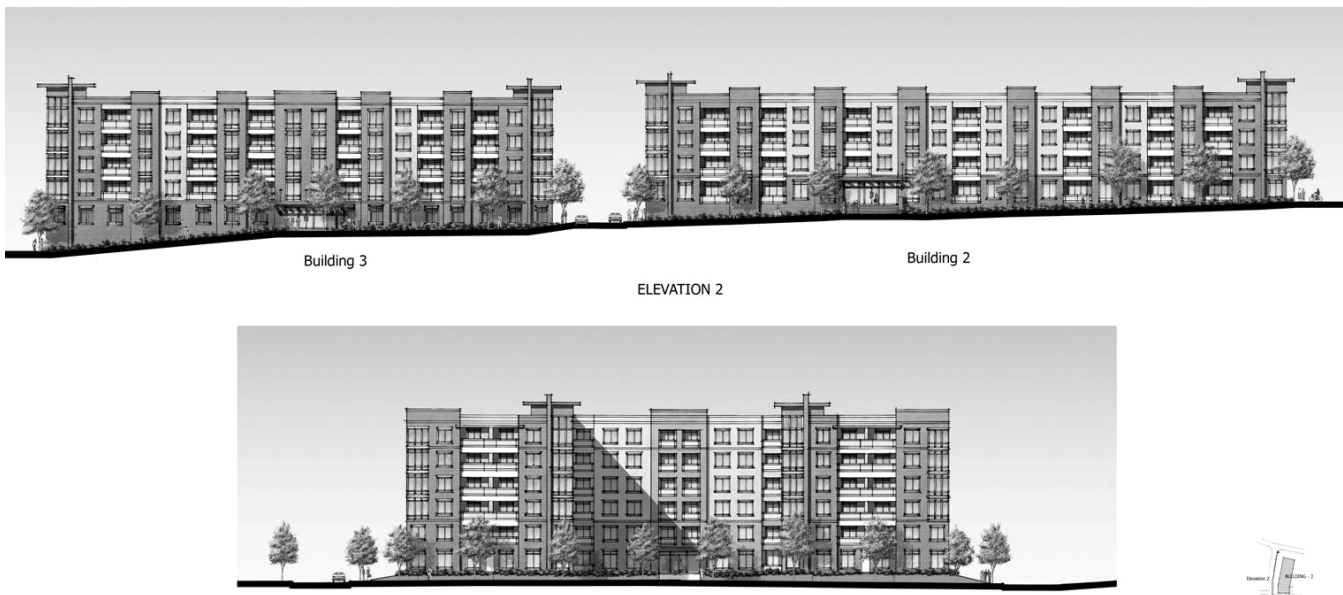


³ Testimony indicated that the Applicant has a legal obligation to maintain approximately 32 surface parking spaces that currently exist on the site proposed for Building Three. To fulfill this obligation, Building Three is intended to be raised, allowing for the construction of replacement surface parking underneath the building, with perhaps 10 to 15 spaces available for residents of the building.

Testimony indicated that Buildings One, Two and Three would have six, four and five stories, respectively, with a maximum building height of 70 feet.⁴ Under the development standards of the PD-44 Zone, the Applicant would be required to have at least 25 percent of the dwelling units in a building with four stories or less, and at least 50 percent in buildings with more than four stories. See Code § 59-C-7.131. The preliminary unit breakdown is 184 units in Building One, 130 units in Building Two and 57 units in Building Three. Applicant currently anticipates 205 one-bedroom units, 148 two-bedroom units and 18 three-bedroom units. The preliminary parking space count shows more than the minimum number of spaces required under the Zoning Ordinance.

Photographs and testimony from Applicant's site designer, Stephen Gang, establish the Applicant's intention to follow the form and prevailing brick materials of the existing office buildings, to maintain architectural compatibility with the Office Park. The residential buildings would have recessed balconies, giving them a residential element and creating what Mr. Gang described as a true mixed-use appearance. Conceptual elevations are shown below.

Conceptual Building Elevations, from Ex. 38



⁴ The Staff Reports lists the building height limit as 87 feet, based on an earlier Development Plan. Applicant subsequently learned that based on Department of Permitting Services policy, because all of the proposed buildings are shown on corner lots with private streets on both sides, height measurements can be taken at any curb elevation along these roads, rather than at the center line of the street grade. This reduced the height of the tallest building, as defined in the Zoning Ordinance, from 87 feet to 70.

The Office Park has an extensive network of sidewalks, as well as a number of open space areas with benches and landscaping, and a small forested area. See photographs on pages 8-9 above. The forested area would be enlarged to satisfy Applicant's forest conservation obligations, and additional sidewalks would be constructed to connect to the existing circulation network. Other amenities shown on the Development Plan include open areas with seating and landscaping, a gazebo and an outdoor swimming pool. Mr. Gang testified that Applicant also intends to provide a clubhouse, a bath house, and a deck on top of the parking garage, which would be available to residents for social events. (These elements are not shown on the Development Plan.)

E. Development Plan

Pursuant to Code § 59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. This development plan must contain several elements, including a land use plan showing site access, proposed buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3. The Development Plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual. The Development Plan is subject to site plan review by the Planning Board, and changes in details may be made at that time. The principal specifications on the Development Plan – those that the District Council considers in evaluating compatibility and compliance with the zone, for example – may not be changed without further application to the Council to amend the Development Plan.

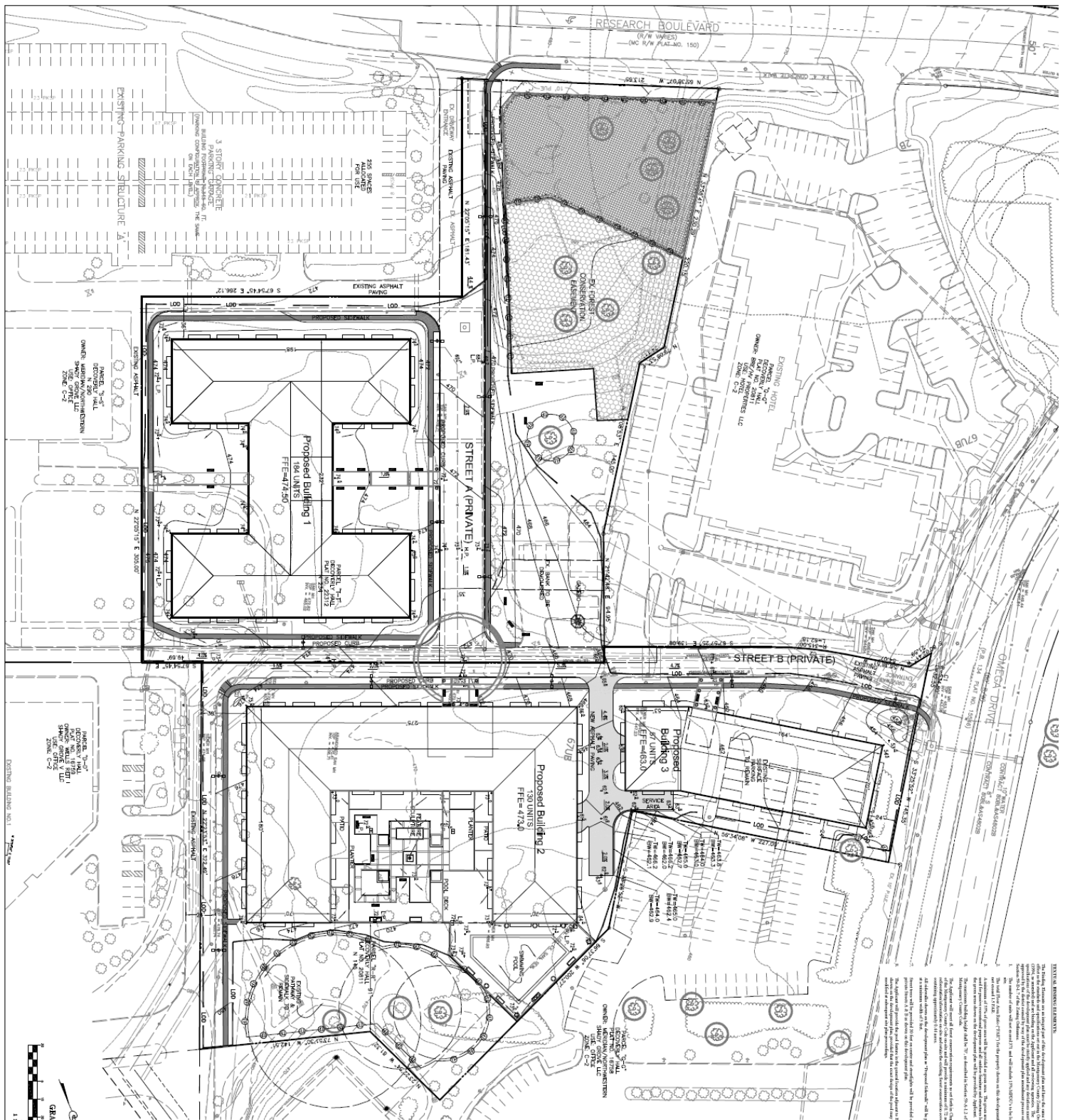
The principal component of the Development Plan in this case is a document entitled Development Plan, Exhibit 50(a), which is reproduced on the pages that follow. Additional elements of the Development Plan have been submitted through exhibits including vicinity maps (Exs. 4 and 48) and a Natural Resources Inventory/Forest Stand Delineation ("NRI/FSD," Ex. 8).

The Development Plan shows the approximate locations of proposed buildings and structures, with exact locations to be specified during preliminary plan and site plan review. The Development Plan includes several textual binding elements, which clarify elements of the proposal that were prominent in Applicant's discussions with Technical Staff: no more than 371 units; 15 percent MPDUs on site; maximum floor area ratio of 1.5; minimum 55 percent green area, to be used for passive recreation; maximum building height of 70 feet; all forest conservation requirements to be met on site; sidewalks to be at least five feet wide; street trees to be placed 30 feet on center; streetlights to be provided on private streets A and B; and the swimming pool to be constructed in the general location shown on the Development Plan.

With regard to phasing, the Development Plan identifies each building as one phase, with its associated infrastructure, but specifies that the three phases may occur in any order or simultaneously.

The Development Plan, consisting of Exhibit 50(a) and supporting exhibits, satisfies the requirements of Code § 59-D-1.3 by showing access points, approximate locations of existing and proposed buildings and structures, preliminary classification of dwellings by number of bedrooms, parking areas, and areas intended for common use but not public ownership. No road dedications are shown on the Development Plan because the internal roads are proposed to be private roads. Should that change during preliminary plan or site plan review, Applicant would be required to request the District Council's approval of a development plan amendment. The graphic portion of the Development Plan, Exhibit 50(a), is reproduced on the next page, with textual elements of the plan provided on the pages that follow.

Graphic Portion of Development Plan, excerpted from Ex. 50(a)



Additional Elements of Development Plan, Ex. 50(a).

LEGEND:

EXISTING TOPO		EXISTING STORM DRAIN	
PROPOSED TOPO		EXISTING TREELINE	
PUBLIC RIGHT OF WAY		EXISTING SPECIMEN TREE	
PROPOSED BUILDINGS		EXISTING CURB & GUTTER	
PROPOSED CURB & GUTTER		EXISTING SIDEWALK	
PROPOSED SIDEWALK		EXISTING SEWER	
PROPOSED LIMIT OF DISTURBANCE		PROP. STREET LIGHT	
PROPOSED BENCH			
PROPOSED PLANTER			

DEVELOPMENT PROGRAM:

All proposed development will take place in three Phases as follows:

Phase I – Construction of Building 1 and associated site infrastructure

Phase II – Construction of Building 2 and associated site infrastructure

Phase III – Construction of Building 3 and associated site infrastructure

The Phases described above may occur in any order or simultaneously

PARKING SCHEDULE:

Proposed Units: Up to 371 Units (See Chart below for Unit breakdown by Building)

Required Parking Spaces: 1.25 spaces per 1 Bedroom (1.25 x 205 one bedroom units=257)

1.50 spaces per 2 Bedroom (1.50 x 148 two bedroom units=222)

2.00 spaces per 3 Bedroom (2.00 x 18 three bedroom units=36)

Total Required Parking Spaces: 515

Proposed Parking Spaces: 550 (including at least 255 to be provided in existing parking garage located on Parcel S-S adjacent to Building 1.)¹

¹ Final number and location of parking spaces to be determined at subsequent Preliminary Plan and Site Plan proceedings.

Additional Elements of Development Plan, Ex. 50(a).**TEXTUAL BINDING ELEMENTS:**

The Binding Elements are an integral part of this development plan and have the same force and effect as the standards and specifications set out in the Montgomery County Zoning Ordinance (1994, as amended) and are binding on the Applicant and all reviewing agencies. The specifications of the development plan must be strictly applied and any deviations must be approved by the district council by way of the development plan amendment process set forth in Section 59-D-1.7 of the Zoning Ordinance.

1. The number of units will not exceed 371 and will include 15% MPDU's to be located on site.
2. The total Floor Area Ratio ("FAR") for the property shown on this development plan will not exceed 1.5 FAR.
3. A minimum of 55% of gross area will be provided as green area. The green area will be used for passive recreational purposes and all outdoor furniture and structures located on the green areas shown on the development plan will be provided by Applicant.
4. The maximum building height shall be 70', as described in Section 59-A-1.2 of the Montgomery County Code.
5. The Applicant will meet all forest conservation requirements as set forth in Chapter 22A of the Montgomery County Code on-site and will provide a minimum of 0.72 acres of reforestation/aforestation on-site and retain the existing forest conservation covenant area containing approximately 0.44 acres.
6. All sidewalks shown on the development plan as "Proposed Sidewalk" will be provided at a minimum width of 5 feet.
7. Street trees will be provided 30 feet on center and streetlights will be provided on the private Streets A & B as shown on this development plan.
8. The Applicant will provide the pool feature in the general location adjacent to Building 2 shown on the development plan, provided that the exact design of the pool may be modified at subsequent site plan proceedings.

Additional Elements of Development Plan, Ex. 50(a).**GENERAL NOTES:**

1. 2' topography prepared by Patton Harris Rust + Associates, pc.
2. Boundary taken from deed plotting of existing recorded lots
3. Existing Zoning: C-2 (General Commercial)
4. Proposed Zoning: PD (Planned Development) – 44.
5. Gross Tract Area: 6.92 ± acres
Parcel R-R (Plat No. 20811): 3.32213 acres
Parcel T-T (Plat No. 22312): 3.59875 acres
6. Election District: 9
7. Planning Area: Gaithersburg and Vicinity
8. Tax Map No.: FS 561
9. W.S.S.C. Map: 220 NW 09
10. ADC Map: Montgomery County Map No. 28
11. Proposed Use: Up to 371 Multi-Family Residential Units
12. Existing Forest Cover: 0.40 acres
13. Existing water category W-1, existing sewer category S-1
14. There are no known historic features on this site, or adjacent to this site
15. There are no cemeteries located on or adjacent to the site
16. Owners:
Parcel R-R - Shady Grove Investors I, LLC c/o David Cheek, The Meridian Group,
3 Bethesda Metro Center, Suite 610 Bethesda, MD 20814
Parcel T-T - Shady Grove Investors II, LLC c/o David Cheek, The Meridian Group,
3 Bethesda Metro Center, Suite 610 Bethesda, MD 20814
17. Planner/Engineer: Patton Harris Rust + Associates,
12850 Middlebrook Road, Suite 200
Germantown, Maryland 20876
18. Architecture: Lessard Group, Inc.
8521 Leesburg Pike, Suite 700
Vienna, VA 22182
T: 703.760.9344 F: 703.760.9328
19. 10' Public Utility Easement runs along all Public Right of Way
20. The predominate soil types are: 2B Glenelg Silt Loam and 67 UB Urban Land – Wheaton Complex

General Notes from Development Plan, Ex. 50(a), cont.

21. Stormwater management facilities shown hereon are based on preliminary design and are subject to final engineering
22. All sidewalk ramps to conform to Montgomery County DPWT Standard No. MC-112.01.
23. All concrete curb and gutter shall be in accordance with Montgomery County DPWT Standard No. MC-100.01, and meet existing curb, gutter, and paving in line and grade
24. Fill areas:
 - A. Class I fill to be placed below all buildings
 - B. Class II fill to be placed below all paved areas including parking lots, drives, and sidewalks
 - C. Class III fill to be placed in areas that will remain "green"
25. Footings to be extended to existing ground where necessary
26. Roof and footing drainage to be discharged into on-site storm drain system
27. Slopes: Maximum- 2:1
Minimum- 2% grassed / 1% paved
28. Lot sizes and shapes, and building locations are approximate only. Exact sizes, shapes and building locations to be determined at subsequent Preliminary Plan and/or Site Plan proceedings.
29. Private Street A and Private Street B are subject to an Amended and Restated Declaration of Easements and Reciprocal Easement Agreement, recorded among the Land Records of Montgomery County at Liber 22261, folio 089, which provide each owner of property in the Shady Grover Executive Center certain rights for access and use said private streets. The existing parking structure on adjacent Parcel "S-S" is subject to a Declaration of Covenants and Reciprocal Easement Agreement, recorded among the Land Records of Montgomery County at Liber 22042, folio 489, which generally provides the owner of Parcel "T-T" certain rights for access and use of said parking garage.

Additional Elements of Development Plan, Ex. 50(a).

PD-44 DEVELOPMENT STANDARDS (TO BE SATISFIED CONSISTENT WITH TEXTUAL BINDING ELEMENTS ABOVE AND PRELIMINARY INDICATIONS BELOW):

Residential Density:

As per section 59-C-7.14 of the Zoning Ordinance-44 Units per Acre – may be increased by 22% (up to 53.7 units per acre) if 15% MPDUs are provided

Provided:

Up to 53.6 units per acre – up to 371 units including up to 56 MPDUs (15% of total units) to be located on-site.

Building Setback:

As per section 59-C-7.15(b), for land that adjoins land for which the area master plan recommends a one-family detached zone, no building other than a one-family detached residence can be constructed within 100 feet of such land

Provided:

None required – Adjoining land is not recommended for a one-family zone in the applicable area master plan.
Minimum setback provided – 10' feet, from lot line.

Building Height:

As per section 59-C-7.15(b), for land that adjoins land for which the area master plan recommends a one-family detached zone, no building can be greater in height than its distance from such land

Provided:

No building height limit required – Adjoining land is not recommended for a one-family zone in the applicable area master plan.
Maximum building height – 70' feet (Per Textual Binding Elements). All heights as defined in Section 59-A-1.2 of the Montgomery County Code.

Green Area:

Minimum 55% of gross area as per Section 59-C-7.16 of the Zoning Ordinance (55% of 6.92 acres (gross area) = 3.81 acres)

Provided:

4.03 acres provided or 58.2% of gross area²

Minimum/Maximum Requirement for Unit Types (Section 59-C-7.131):

Multi-family units

- 4-story building or less – 25% (minimum):
93 units
- More than 4-story building 50% (minimum):
186 units

Provided:

- 4-story building or less- 35%
130 units provided in Building 2
- More than 4-story building – 65%
241 units provided in Buildings 1 and 3
(Unit type and distribution in Buildings 1-3 is approximate. Exact unit type and distribution to be determined at subsequent preliminary plan and/or site plan proceedings, provided that the number of units in each building type will not fall below the minimum required.)

² Green Area provided is approximate and is subject to change based on final engineering and further revision during subsequent Preliminary and Site Plan proceedings provided that a minimum of 55 % of gross area shall be provided as green area per Textual Binding Elements.

The zones that require a development plan generally do not include the type of strict development parameters that are imposed in other zones, for example maximum building heights and minimum building setbacks. They do, however, require the submission of a development plan, which “must clearly indicate how the proposed development meets the standards and purposes of the applicable zone.” Code § 59-D-1.3. In this case, the Development Plan shows clearly how the proposed development would satisfy all of the standards of the PD Zone, with the possible exception of building height. The Development Plan does not specify the intended height of each of the three buildings, which is apparently an oversight, given that the heights were specified in testimony as six stories (Building One), four stories (Building Two) and five stories (Building Three). As shown on the previous page, the portion of the Development Plan that addresses the development standards of the zone states, with regard to the requirement that at least 25 percent of the units be in buildings of four stories or less, that 35 percent of the buildings are to be provided in Building Two. With regard to the requirement that at least 50 percent of the units be in buildings with more than four stories, the same portion of the Development Plan states that 65 percent of the units would be in Buildings One and Three. These statements imply, consistent with the testimony, that Building Two would have four stories or less, and that Buildings One and Three would be taller than four stories. In addition, a textual building element specifies a maximum building height of 70 feet. Taken together, the Hearing Examiner finds that these elements satisfy the requirements of Code § 59-D-1.3 with regard to the building height requirements of the PD Zone.

F. Master Plan

1. Summary of Objectives and Recommendations

The subject property lies within the area covered by the *1990 Approved and Adopted Shady Grove Study Area Master Plan* (the “Master Plan”). The Master Plan refers to the portion of the study area west of I-270, which includes the subject site, as the “R&D Village.”

The Master Plan identifies in its “Plan Highlights” the following broad, “community and County-wide objectives” (Master Plan at 3):

- providing employment opportunities for a variety of businesses and enterprises;
- providing a sense of community identity for both existing and future residents;
- increasing the County’s total housing stock and concurrently providing an appropriate mix of affordable housing;
- providing a safe, efficient, and adequate transportation system;
- providing receiving areas for Transferable Development Rights (TDRs) to implement the County’s Agricultural Preservation Program;
- encouraging the preservation of historic resources;
- providing facilities such as schools, parks, and recreation facilities on a timely and adequate basis; and
- encouraging the preservation of natural resources.

The Master Plan strongly endorses “traditional neighborhood concepts,” which it describes as integrating housing, employment, services, retail and public spaces at the neighborhood level, and tying them together with transit ways (rail or bus), streets, bikeways and sidewalks. *Id.* at 3. It also recommends that the Shady Grove Study Area continue to be designated as a major employment and housing center due to its strategic location in the I-270 corridor. *See id.*

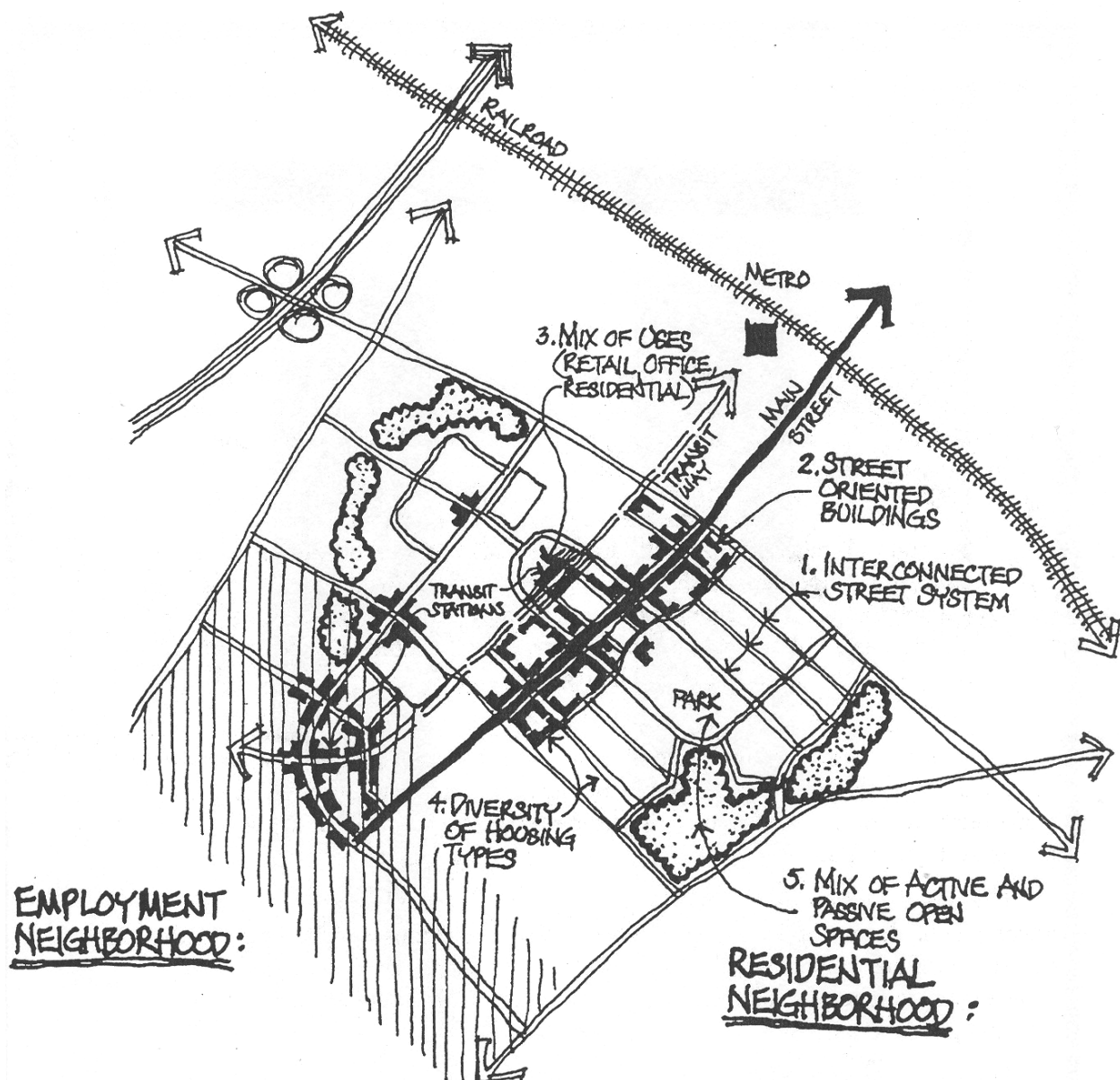
The Master Plan states several land use objectives. The first is to provide a comprehensive transit system. *See id.* at 21. The second is to encourage a mix of employment uses and densities. *See id.* at 23. The third is to provide for a broad mix of residential units, including affordable housing. More specifically, the plan “envision[s] a mix of housing types at the neighborhood level, rather than physically separating each unit type.” *Id.* In connection with this objective, the Master Plan includes a conceptual drawing, Figure 4.2, which is reproduced on the next page. This drawing identifies “generalized locations” proposed for the various use types -- residential, retail/office, research and development, and combined R&D/housing. *See id.* at 24. The subject site is included within a retail/office area immediately west of I-270, which faces another retail/office area across I-270, and abuts a proposed residential area to the west. It appears that at least half of the land area identified on this drawing is shown for non-residential use.

Master Plan Drawing: Land Use and Design Concepts, Figure 4.2

The Master Plan's fourth land use objective is creating "identifiable residential and employment neighborhoods." *Id.* at 25. In connection with this objective, the plan identifies several elements that foster a sense of community: a mix of uses (retail, office and housing); an interconnected street system; diverse housing types; street oriented buildings; and a mix of active and passive open space areas. Later text suggests that the type of office uses the

Master Plan considers to foster a sense of community are professional services “provided at a pedestrian scale and oriented to the needs of residents.” *Id.* at 26. The Master Plan notes that such services, like local retail, help create an environment with more than just work-related activity. Street-oriented buildings are encouraged, instead of buildings oriented towards parking lots, to create pleasing street fronts and facilitate pedestrian movement. Active and passive recreation areas are encouraged within each neighborhood, preferably for the joint use of workers and residents. A conceptual neighborhood diagram is shown below.

Master Plan Conceptual Neighborhood Diagram. Figure 4.3



The fifth land use objective is enhancing transit serviceability by orienting higher intensity development towards designated highways and transit ways. See *id.* at 36. The diagram accompanying this text indicates a preference for buildings oriented towards the street, with very little setback from the street, and transit ways running directly in front of the buildings. See *id.* Remaining objectives address roads, transit, parks and open spaces, historic resources, reinforcing the educational aspect of the R&D Village, and locating an executive conference center in the study area.

In discussing the background for its land use recommendations, the Master Plan found that the Shady Grove Study Area had a high ratio of jobs to housing, indicating an imbalance and a need for more housing. *Id.* at 51-53. The plan acknowledges that such an imbalance throughout the County would lead to serious traffic congestion. It noted, however, that despite the high jobs/housing ratio expected in the Shady Grove Study Area, the larger Gaithersburg Policy Area was expected to have a significantly lower ratio. Moreover, the Master Plan rejects measures that would most directly correct the jobs/housing imbalance in the study area -- those that would significantly increase housing and decrease employment. See Master Plan at 53. Specifically, the plan finds that not designating any additional land for employment would be unacceptable, as it would fail to capitalize on the unique attractiveness of the study area to R&D firms. It also finds that significantly increasing housing would require densities that would lead to mostly high-rise, multi-family dwellings, which would conflict with the Master Plan goal of housing diversity. As the Hearing Examiner reads this section, the Master Plan establishes that correcting the jobs/housing imbalance in the study area would be beneficial, but should not be pursued at the expense of other, higher priorities such as creating a world-class R&D center and promoting diverse housing options.

The only individual properties for which the Master Plan makes specific recommendations are very large, vacant tracts, such as the Crown Farm and the King Farm. Likewise, these are the only tracts recommended as suitable for floating zones. Technical Staff

reports that the preliminary plan and site plan for the Office Park were approved while the Master Plan was in preparation, so full build-out with office uses was anticipated. See memorandum from Community-Based Planning Staff, dated April 21, 2006, attached to the Staff Report (“Community-Based Planning Memo”). This is reflected on the Master Plan’s “Development Profile” map, which identifies the Office Park, including the subject site, as an “Existing/Committed Development” site. See *id.* at 16-17. The Master Plan’s Land Use Map (Figure 5.1), which builds on the conceptual recommendations of Figure 4.2, shown on page 26 above, recommends the Office Park (and the subject site) for office use. See *id.* at 49. Similarly, the Office Park and the subject site are shown in an area of C-2 zoning, with a small sliver of O-M zoning along Omega Drive, on the Master Plan’s “Zoning at the Time of Master Plan Adoption” map (Figure 6.1) and its “Recommended Base Zones” map (Figure 6.2). See *id.* at 74, 76. Moreover, although the Master Plan recommends the PD Zone as an optional zone for an area just west of the subject site, the subject site is not recommended for an optional zone. See “Properties Proposed for Optional Zones” map (Figure 6.3), *id.* at 77.

2. Analysis

The Planning Board’s recommendation in this case states that although the subject property was not explicitly recommended in the Master Plan for the PD Zone or for residential use, “compliance with the master plan can be found because of the following:

1. The Plan recommends a zone which allows residential use.⁵
2. Both the master plan and the general plan support mixed use development in the I-270 corridor.
3. The density, as limited by a binding element (1.5 FAR), is consistent with the zone recommended by the plan.” Ex. 34 at 2.

⁵ The Zoning Ordinance was amended in 1991, one year after the Master Plan was adopted, to permit “dwellings” as a special exception in the C-2 Zone, provided that compatibility standards are met, with a base density of six units per acre.

The Staff Report concludes, without discussion, that the proposed rezoning would be consistent with the recommendations of the Master Plan. Staff Report, Ex. 26, at 13. This conclusion is followed by a brief paragraph noting that the Master Plan anticipated build-out of the Office Park and therefore recommended the area including the subject property for continued commercial zoning. *See id.*

The Community-Based Planning Memo states that the preliminary plan and site plan approvals for the Office Park took place while the Master Plan was being developed, and the plan expected the entire site to be built out as an office park. The Community-Based Planning Memo acknowledges that the proposed rezoning and Development Plan are not consistent with the Master Plan recommendations for this site, but states that the proposed project would “contribute to the Plan goal of providing more housing options near jobs in the I-270 Corridor and the Life Sciences Center. . . . [and would] increase the supply of MPDUs, which is a significant public benefit.” Community-Based Planning Memo at 4. For these reasons, and because the Applicant modified its original submissions to decrease the proposed density and remove one proposed building, Community-Based Planning Staff supports the requested rezoning. *See id.*

The Applicants’ land planner, Mr. Blumberg, opined that the proposed rezoning and Development Plan would comply with the Master Plan’s general recommendations for development in the study area. Ex. 19(e) at 7. He notes, in particular, that the proposed residential development would help bring down the jobs/housing ratio, and would add to the stock of affordable housing in the study area. Mr. Blumberg also notes that the subject property would be well served by the transit way that the Master Plan proposed along Omega Drive. The Master Plan recommended a transit stop about 1,000 feet from the subject property, to the north on Omega Drive. Testimony from the Applicant’s site planner suggested that current plans for the Crown Farm depict the transit stop farther away, about 2,000 feet from the subject site. Mr. Blumberg opined that either way, the transit stop would be fairly close. He also observed that

the proposed development would add residential density that would fuel the mixed-used synergy with the existing Washingtonian Center and proposed Crown Farm development. He notes, in particular, that the Crown Farm development would create the “critical mass” of residential units necessary to justify implementation of the Master Plan’s transit way recommendations. *Id.* at 7-8.

Mr. Blumberg finds that the proposed development also would meet the Master Plan objective of creating identifiable residential and employment neighborhoods, by creating a well-integrated residential/office development with compatible buildings, shared amenity spaces including natural and built recreation areas, an interconnected street system, and walkways connecting uses to each other and to surrounding public sidewalks. *See id.* at 8. He describes it as a “microcosm” of the type of neighborhoods recommended in the Master Plan, and notes that on Figure 4.2, which identified “generalized locations” for various types of uses, the retail/office area including the subject site was right next to an area shown as residential. He stated that the open spaces and sidewalks would foster a sense of community, and opined that the proposed development would further the Master Plan objective of locating higher intensity uses near transit.

As discussed in more detail in Part V.A.(a) below, the Hearing Examiner finds that the proposed Development Plan does not comply with the use and density recommended in the Master Plan.

G. Other County Plans and Policies

In addition to the Master Plan, Mr. Blumberg opined that the proposed development would also be consistent with the 1993 refinement of the County’s General Plan, which identifies a harmonious balance of land uses, including a balance between housing and jobs, as one of its principal elements. He notes that a reasonable mix of housing and jobs encourages shorter commuting distances, allows residential and commercial sectors to share the tax burden, and moderates pressures on housing costs. On the other hand, an over-supply of jobs or housing can

lead to traffic congestion, inequitable distribution of the tax burden, and high housing prices. Reading from the 1993 General Plan, Mr. Blumberg notes its findings that Montgomery County has become a major employment center, with the number of jobs having doubled between 1970 and 1989 – a much greater rate of increase than was anticipated in the original 1969 General Plan. Mr. Blumberg noted that as of January 1993, the County had an estimated capacity to accommodate between one million and 1.2 million additional jobs, creating a need for additional housing. Mr. Blumberg cited additional goals in the General Plan for the I-270 corridor, including developing compact, mixed-use, transit serviceable centers; achieving better access for public and private services in residential areas; encouraging a sense of community identity; and protecting environmentally sound areas. He interprets this as calling for bringing housing, employment and retail uses closer together, offering a convenient, lively place to live and work – in his view, exactly what the present rezoning request proposes. Tr. at 67.

Mr. Blumberg also cited the Montgomery County Housing Policy, as stated in *Montgomery County, A Place to Call Home: the Housing Policy for Montgomery County, January 2001*. This document notes that over the years, both extensive development and the County's agricultural reserve protection have reduced the amount of land available for additional development, resulting in a need to encourage new housing construction with higher densities and mixed uses, particularly near employment and transportation centers.

Mr. Blumberg also referred to a document entitled "Framework for Planning in the Future," which is a working draft report that Technical Staff prepared in March, 2006. He described it as setting the stage for the next phase of planning by presenting a vision of Montgomery County in transition, from a largely auto-dependent suburb to a more urban, mixed-use form, with transit-connected centers located along shared-use boulevards and transit corridors. Mr. Blumberg noted that this document forecasts that in the next 25 years, the County will add 170,000 jobs, 94,000 housing units and 215,000 people. To accommodate this level of growth, the County will need more affordable housing and a better mix of jobs and

housing. The Framework goes on to identify the biggest jobs/housing imbalance as located along the I-270 corridor, which is job-rich and housing-poor.

H. Public Facilities

Under the County's Adequate Public Facilities Ordinance ("APFO," Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, area schools, water and sewage facilities, and police, fire and health services will be adequate to support a proposed development, and in turn, whether the proposed development would adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that the County Council sets each year in the Annual Growth Policy ("AGP") and biennially in the two-year AGP Policy Element.⁶ While the final test under the APFO is carried out at subdivision review, the District Council must first make its own evaluation as to the adequacy of public facilities in a rezoning case, because the Council has primary responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review, and the fact that the Council's review is much broader at the zoning stage than what is available to the Planning Board at subdivision, a process designed to more intensively examine the "nuts and bolts" of a development. The District Council is charged at the zoning stage with determining whether the proposed development would have an adverse impact on public facilities and, if so, whether that impact would be mitigated by improvements reasonably probable of fruition in the foreseeable future.

⁶ See *2003-05 Annual Growth Policy – Policy Element, Resolution No. 15-375*, adopted October 28, 2003, which remains in effect. The Hearing Examiner hereby takes official notice of the 2003-05 AGP Policy Element.

1. Transportation

Under the 2003-05 AGP Policy Element, which remains in effect, subdivision applications are subject to only one transportation test, Local Area Transportation Review ("LATR").⁷ The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in the preparation of reports to the Hearing Examiner for zoning cases. LATR Guidelines at 1. LATR involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hours of the morning and evening peak periods (6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.).

Applicant performed a traffic study as required in this case, taking into account existing roads, programmed roads and available or programmed mass transportation, as well as existing traffic, traffic anticipated from nearby development that is approved but unbuilt ("background" traffic), and trips expected to be generated by the proposed development. The traffic study was based on the original proposal for 480 dwelling units. With 480 dwelling units, the proposed development would be expected to generate a total of 195 vehicle trips during the weekday morning peak period and 227 trips during the weekday evening peak period. The traffic study concluded, and Technical Staff agreed, that with the proposed development in place, critical lane volumes ("CLVs") at the key intersections studied would remain below the CLV standard of 1,475 for the R&D Village Policy Area. See Ex. 19(k) at 13; Memorandum from Transportation Planning Staff dated April 19, 2006, attached to Staff Report ("Transportation Staff Memo"). This supported Technical Staff's conclusion that the proposed development would have no adverse impact on area roadways.

Technical Staff also found that the existing access points on Omega Drive, Research Boulevard and Corporate Boulevard, as well as the vehicular and pedestrian circulation systems shown on the Development Plan as originally proposed would be safe and adequate.

⁷ See 2003-05 AGP Policy Element at 6-7; *Local Area Transportation Review Guidelines Approved and Adopted July 2004* ("LATR Guidelines") at 1. The Hearing Examiner hereby takes official notice of the LATR Guidelines.

Transportation Staff Memo at 1-2. It is not clear why Transportation Staff reviewed a Development Plan showing 480 units, when a revised Development Plan showing 371 units was filed three weeks before the date of the Transportation Staff memo. Nonetheless, a comparison of the 480-unit plan and the current plan shows that the external access is unchanged, and the comprehensiveness of the internal vehicular and pedestrian circulation systems is very similar. Applicant's traffic expert, Glenn Cook, opined that the access points and vehicular and pedestrian circulation systems as currently proposed would be safe, adequate and efficient. Tr. at 38-40.

Following revision of the proposal to reduce the number of dwelling units from 480 (which Technical Staff found resulted in a very crowded site plan) to 371, Applicant's transportation planner prepared a comparison of the number of trips that would be generated. He found that with 371 units, the development would generate 23 percent fewer trips: 151 trips during the weekday morning peak hour, and 175 trips during the weekday evening peak hour. See Ex. 42. He compared this to the number of trips that the subject site would be expected to generate if it were developed with office buildings, per the approved site plan. The comparison demonstrated that the residential use of the subject site would generate about half the amount of traffic that commercial use would create – residential development decreases the anticipated traffic by 57 percent during weekday morning peak period, and 46 percent during the weekday evening peak period. See *id.*

2. Water and Sewer

The subject property is served by public water and sewer. Technical Staff reports that local service is considered adequate and the impact from rezoning would be negligible.

3. Schools

Technical Staff reports, based on information provided by Montgomery County Public Schools ("MCPS"), that the subject property is in the area served by Rosemont Elementary School, Forest Oak Middle School and Gaithersburg High School. Enrollment at the cited elementary and middle schools is currently within capacity and is expected to stay within capacity. Enrollment at

Gaithersburg High School currently exceeds capacity and is projected to exceed capacity in the future. See Staff Report at 6. However, the Planning Board has determined that under the current Growth Policy test, all school clusters in the County are considered to have adequate capacity, for purposes of reviewing subdivisions in FY2007.⁸

Based on the preliminary unit mix, Montgomery County Public Schools ("MCPS") expects the proposed development to generate approximately 48 elementary, 24 middle and 23 high school students. See Staff Report at 6-7.

I. Environmental Issues and Storm Water Management

Environmental Planning Staff reports that the Preliminary Forest Conservation Plan meets the basic parameters of the forest conservation law and the Planning Board's Environmental Guidelines, and recommends approval of the application. See Environmental Planning memorandum attached to Staff Report. The small existing forested area of 0.41 acres, which is protected by a conservation easement, would be preserved, and additional forest covering a minimum of 0.72 acres would be added on site.

Applicant's engineer, John Clapsaddle, testified that the proposed development, like the existing Office Park, would make use of a nearby regional stormwater management facility for water quantity control. Additional water quality systems would also be required on site, and these would be provided in the form of underground filtration systems.

J. Opposition to Applicant's Legal Argument

The record contains two letters from Stanley Abrams, counsel to Wheaton property owner Harold Weinberg, arguing that property should not be reclassified to the PD Zone unless it was recommended in the applicable master plan for residential use, at a density of at least two dwelling units per acre. See Ex. 33, containing letters from Mr. Abrams to the Hearing Examiner

⁸ The Hearing Examiner takes official notice of the Planning Board's memorandum to the County Council that conveys the Planning Board's June 22, 2006 finding that school capacity is adequate, under the Growth Policy, to support subdivision approval in all clusters in FY 2007, which began on July 1, 2006.

and to the Planning Board.⁹ Mr. Weinberg's interest in the present case concerns its impact as precedent, which could affect the outcome of LMA No. G-845, a pending case in which Mr. Weinberg owns property near the subject property and opposes the rezoning. In G-845, as in the present case, the applicant seeks reclassification from a commercial zone to the PD Zone.

Mr. Abrams argues that the importance of master plan compliance in the PD Zone is set forth in at least three places in the purpose clause:

It is the purpose of this zone to implement the general plan . . . and the area master plans by permitting unified development consistent with densities proposed by master plans. . . .

* * * * *

It is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories.

* * * * *

This zone is in the nature of a special exception, and shall be approved or disapproved upon findings that the application is or is not proper for the comprehensive and systematic development of the county, is or is not capable of accomplishing the purposes of this zone and is or is not in substantial compliance with the duly approved and adopted general plan and master plans.

Mr. Abrams also cites Section 59-C-7.121, which provides that no land can be classified under the PD Zone unless it is "within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher." He maintains that the density referred to in this section is a specific residential density, not a

⁹ Mr. Abrams' letters were admitted into the evidentiary record over the objections of Applicant's counsel, Scott Wallace, who argued that they are not relevant because Mr. Weinberg does not have an interest in any property in the area of the subject site for the present case, G-841. In the Hearing Examiner's view, Mr. Weinberg is entitled to raise legal issues in the present proceeding that may have a direct effect on the outcome of a pending local map amendment application in which he does own nearby property. The issues discussed in the letters clearly are germane to issues that the District Council must address into order to decide this case. The principal issue Mr. Abrams raises was also raised in the Technical Staff report, and would have been addressed by the Hearing Examiner in any event. Moreover, this office has a longstanding practice of accepting testimony and written comment during local map amendment proceedings from any person who wishes to be heard, without regard to their location of residence or property ownership. Under these circumstances, it would be inappropriate to exclude Mr. Abrams' letters due to a lack of property ownership.

commercial density (expressed in terms of FAR), and that this requirement cannot be satisfied by applying a commercial zone density, or by referencing a potential special exception in the C-2 Zone, which would require Board of Appeals approval and would permit a base density of only six dwelling units per acre.

Mr. Abrams also notes the finding required for approval of any Development Plan under Section 59-D-1.61(a), that the zone applied for “substantially complies with the use and density indicated by the master plan or sector plan . . . “

Mr. Abrams argues that the proposed development fails to substantially comply with the Master Plan because the plan recommends the subject site for C-2 zoning and commercial office use; the text of the Master Plan does not recommend or even mention PD zoning or residential use of the site, although it does specifically recommend PD zoning on other properties; as noted by Technical Staff, the Master Plan does not indicate any residential density for the subject site; and the Master Plan’s Development Profile table shows the Office Park with 1.3 million square feet of office space and no residential development.

Finally, Mr. Abrams argues that the legal reasoning applied in LMA G-803, which the Hearing Examiner departs from in this case for reasons discussed in Part V.A.(a)5. below, was erroneous and should not be applied in the present case. He argues that neither the Zoning Ordinance nor the Master Plan contemplates the conversion of commercial density to residential to fulfill their requirements. He further maintains that if the Dwellings special exception is found to be the basis for a residential use recommendation in the master plan, then the maximum density permitted in that special exception should be considered the Master Plan’s residential density recommendation for the site. If that were the case, Mr. Abrams contends, the proposed development would be found inconsistent with the density proposed in the Master Plan, because the present application proposes a base density of 44 units per acre, with bonus density up to 56 units per acre – far higher than the six units per acre base density under the Dwellings special

exception, and more than double the 21.5 units per acre the special exception permits with 35 percent productivity housing.

Applicant's counsel, Scott Wallace, in a responsive submission to the Planning Board, attempted to attack Mr. Abrams' arguments by simplifying them, suggesting that Mr. Abrams argued the PD Zone can be applied only to land that is specifically recommended for PD zoning in the applicable master plan. See Ex. 32. While Mr. Abrams noted that the subject property was not recommended for the PD Zone in the Master Plan, it is clear from the totality of his remarks that he acknowledges such a specific master plan recommendation for the PD Zone is not a prerequisite to obtaining the PD Zone. In the Hearing Examiner's view, no serious argument can be made to the contrary.

Mr. Wallace contends that Section 59-C-1.21, which requires that land reclassified under the PD Zone be shown on the master plan with "a density of 2 dwelling units per acre or higher," is satisfied in this case by the availability of a Dwellings special exception in the C-2 Zone, which allows a base density of six units per acre. Mr. Wallace notes that when the County Council added the Dwellings special exception to the C-2 Zone in 1994, it recognized the intent to encourage residential use as an alternative to commercial use of properties in the C-2 Zone. He suggests that as a result, "it must be assumed that the County Council anticipated that the PD Zone could be applied to commercially-zoned properties when it allowed multi-family dwellings in commercial zones at density greater than 2 units per acre." *Id.* at 2, n.2. The Hearing Examiner sees no reference to application of the PD Zone or any other floating zone in the legislative history, and thinks it unlikely that this potential, indirect consequence of the zoning text amendment was brought to the Council's attention or considered by it.

Mr. Wallace also relies on the District Council's decision in LMA G-803, which, as noted above, the Hearing Examiner departs from in this case for reasons discussed in Part V.A.(a)5. below. He terms this decision "controlling precedent," but as the Council members are

certainly aware, each case must be decided on its own merits, not based on past Council actions. In the Hearing Examiner's view, only judicial decisions carry the weight of controlling precedent.

Mr. Wallace points out that Technical Staff apparently received some form of guidance from the County Attorney's office to the effect that the reasoning applied in G-803 is acceptable. Nothing in the record suggests that this guidance was provided in the form of a formal legal opinion, which reduces its value. Moreover, there is no indication whether the County Attorney's office believes that the reasoning used in G-803 *must* or *may* be followed; the undersigned expects that if asked, the County Attorney's office would say the latter.

Mr. Wallace argues that the proposed development would substantially comply with the Master Plan because it would serve "a central goal of the Master Plan . . . to increase the supply of housing in the planning area and in particular, in close proximity to transit and employment centers." Ex. 32 at 4. He argues that the development would also meet the Master Plan's goals of increasing the County's total housing stock, including affordable housing; promoting higher intensity uses at designated transit stops; and creating identifiable residential and employment neighborhoods. Mr. Wallace contends that the proposed development would satisfy these goals by providing a significant amount of housing, including MPDUs, which would be in close proximity to employment centers, well-served by transit, and would create an identifiable mixed-use neighborhood with compatible buildings and shared amenity spaces. Mr. Wallace maintains that the Master Plan "clearly envisions a higher density mix of both residential and employment uses for the area in which the Property lies." *Id.* at 5. This is true, in a broad sense. What Mr. Wallace overlooks, in the Hearing Examiner's view, is that within that mix, the subject site was recommended solely for employment uses, because it was expected to develop per its office park approvals.

Finally, Mr. Wallace states that the proposed development would further other county policies such as Smart Growth principles and increasing affordable housing opportunities. *Id.*

IV. SUMMARY OF HEARING

A. Applicant's Case in Chief

1. Steven Gang, land planner. Tr. at 6 – 34.

Mr. Gang was designated an expert in urban design and site planning. He testified that the planning for this application has been closer to the level of detail normally expected at site plan than to what is expected at zoning. Mr. Gang described the location of the subject site and the surrounding area. He noted that the site is about 2,000 feet, a bit more than a quarter of a mile, from the area where the proposed transit way station is being planned. He described the existing office park layout, which includes office buildings, parking lots, open spaces and two parking garages. Mr. Gang described the development as very pedestrian-friendly, because there is a street running down the center, with sidewalk on both sides, mature trees and sitting areas. He described the existing buildings as brick, generally four stories in height, with balconies and, in some cases, large expanses of window. Public open spaces are located at each end of the site, with benches, large trees and other plantings.

Mr. Gang explained that tallest of the three residential buildings proposed in this application, the six-story "Building One", would be located between the extended-stay hotel and an existing office building. It would be across the street from a parking garage that serves the nearby office building, but was designed to also serve the office building originally planned for the subject site. It has considerable excess capacity, and approximately 252 spaces would be available for residents of the proposed building. Mr. Gang pointed out, moreover, that the office use would have little need for parking spaces during evenings and weekends, making additional spaces available for residents during those time periods. Under the current plans, Building One would be about 70 feet from the parking garage, which Mr. Gang described as not unusual in urban areas. Tr. at 26-29. He noted that the parking structure is three stories high and very open, and that a double row of trees would be planted on both sides of the street.

Mr. Gang stated that the other two residential buildings would be four stories ("Building Two") and five stories ("Building Three"), respectively. Building Three would be located on the site of an existing surface parking lot where the Applicant has an obligation to maintain approximately 32 parking spaces for the use of tenants in the adjacent office building. The Applicant plans to make Building Three a raised building, with the surface parking spaces underneath it. Most of those spaces would be reserved for office users, but a small number, 10 to 15 spaces, would be available for Building Three residents. Mr. Gang noted that the larger surface parking lot near Building Three lies outside the subject property and would not be affected by the proposed development. He further explained that aside from the 10 to 15 surface spaces on the site of Building Three, residents of Buildings Two and Three would park in an underground parking facility beneath Building Two. The entrance is planned on the west side of Building Two, between the two buildings.

All three of the proposed buildings would incorporate the styles and building materials of the existing office buildings, and would use the existing roads. The residential buildings would have recessed porches, creating the appearance of a true mixed-use community. They would share a clubhouse, a swimming pool, a bath house, and a deck on top of the parking garage, available to all residents for social events. Mr. Gang noted that the Applicant has worked with Technical Staff on many details of the proposed development, including the orientation of the pool in terms of privacy and light. He observed, in addition, that an existing forest conservation area on Research Boulevard would be preserved.

Mr. Gang testified that based on the current plans, the proposed residential buildings would have setbacks similar to those of the office buildings, with at least 120 feet between buildings. He noted that with 371 units, approximately 56 would be MPDUs, and that the proposed project would add residential units near employment centers (such as the Office Park itself and the nearby Life Sciences Center) and the proposed transit way. Moreover, it would provide a 24-hour presence at the Office Park, and would preserve a significant amount of green space. Mr. Gang

opined that the proposed development would be compatible with existing buildings and uses in the surrounding area.

2. Glenn Cook, traffic engineer. Tr. at 35 – 42.

Mr. Cook was designated an expert in traffic engineering and transportation planning. He testified that his firm prepared a traffic study for the proposed project as originally proposed, with 480 dwelling units. They also prepared a trip generation comparison addressing the density currently proposed, which is no more than 371 units. Mr. Cook declared, based on his traffic study, that all of the intersections studied would operate within the applicable congestion standard of 1,475 with the 480 units originally proposed. He noted that the project as currently proposed would generate approximately 23 percent fewer vehicle trips.

Mr. Cook confirmed that the subject site is classified under the C-2 Zone and is part of the Office Park, which has been approved for approximately 975,000 total square feet, of which roughly 210,00 square feet have not been built. He stated that if the subject site were developed with office uses in the C-2 Zone, it would yield approximately 210,000 square feet of space, which would generate 325 to 250 vehicle trips during the peak hours. By comparison, a residential project with 371 units would generate about half as much traffic – 57 percent less traffic during the weekday morning peak hour, and 46 percent less during the weekday evening peak hour.

Mr. Cook opined that the proposed development would satisfy the minimum parking standards applicable under the Zoning Ordinance. He also opined that the site access from Research Boulevard, a signalized intersection, and Omega Drive, right turn in/out only, would be safe, convenient, adequate and efficient for the proposed project. With regard to pedestrian circulation, Mr. Cook noted that the Office Park has internal sidewalks on both sides of the main road, and on the exterior of both roadways. He described it as an ideal set-up for pedestrian circulation between the office uses and the proposed residential uses. In addition, these sidewalks connect to sidewalks along the property frontage on Research Boulevard and Omega Drive.

3. John Clapsaddle, civil engineer. Tr. at 42 – 46.

Mr. Clapsaddle was designated an expert in civil engineering. He testified that his firm prepared the engineering report, the storm water management concepts, the forest conservation plans and the Development Plan.

Mr. Clapsaddle stated that stormwater management for the Office Park is provided mostly off-site, via a regional facility. He noted that the Applicant would be required to provide additional water quality enhancement on site for the proposed residential development, which would be accomplished by installing underground treatment facilities. Mr. Clapsaddle observed that using an existing off-site stormwater management facility minimizes the amount of land disturbance and grading on site.

Mr. Clapsaddle testified that all forest conservation requirements would be met on site, through preservation of an existing 0.44 acres of forest that is already under a forest conservation easement, and planting an additional 0.72 acres of forest.

Mr. Clapsaddle noted that existing public water and sewer facilities are adequate to support the proposed development. He also observed that using an existing parking structure to serve one of the proposed residential buildings, and putting the parking for the other two under the footprint of one of the new buildings, eliminates any need for new surface parking and reduces the need for grading on site.

4. Al Blumberg, land planner. Tr. at 46 – 104.

Mr. Blumberg was designated an expert in land planning. His role in the present case was to analyze the site and the proposed development plan from the perspective of the Montgomery County Zoning Ordinance and the area master plans.

Mr. Blumberg first spelled out how the proposed development would satisfy the requirements under the PD Zone regarding unit types (minimum of 25 percent of the buildings at four stories or less and 50 percent over four stories). He then turned to the Master Plan, noting that the Shady Grove Study Area Master Plan was adopted in 1990, identifying some of the area it

covered as the Life Sciences Center and some for office development. Mr. Blumberg confirmed that the Shady Grove Master Plan Amendment that was under consideration by the Council at the time of the hearing in this case does not include the subject property – it covers only the portion of the Shady Grove area east of I-270. [Applicant's counsel interjected his understanding that a master plan update for the area west of I-270 is expected to get to the Council in 2007. Tr. at 53.]

Mr. Blumberg stated that the 1990 Shady Grove Master Plan made many references to the need for both housing and jobs, and included a conceptual plan with proposed locations for housing and for office uses. He conceded that the subject site is in area that was recommended for office use, which reflected what was anticipated at that time, given that there was an approved preliminary plan for the Office Park providing for 900,000 square feet of office space. Mr. Bloomberg acknowledged that the subject site was shown on the Master Plan maps as developed property.

Mr. Blumberg called the present application the “wave of the future,” as developers seek to create mixed use developments, in part by using properties previously zoned commercial for residential use. In fact, Mr. Blumberg contended, the Master Plan discussed an imbalance between jobs and housing in the R&D Village as a challenge to be addressed, to create as much as possible the opportunity for people to live and work in the same community. The Master Plan identified the need for public transit on the west side of I-270, to allow workers using the Metro station on the east side of I-270 to reach jobs on the west side, and it set forth objectives to provide employment opportunities with a variety of businesses, to provide a sense of community identity for existing and future residents, and to increase the County's housing stock, with an appropriate mix of affordable housing.

Mr. Blumberg went on to observe that the Master Plan recommended that the Shady Grove Study Area continue to be designated as a major employment and housing center because of its strategic location on the I-270 corridor. It also endorsed traditional neighborhood concepts, with housing, employment, retail uses and public spaces integrated at the neighborhood level and

tied together by transit ways, such as rail, bus, streets, bikeways and sidewalks. Mr. Blumberg stated that the “traditional neighborhood concept” includes buildings close to the street, such as in urban areas of the County like Friendship Heights, Bethesda and Wheaton. He observed that the proximity of the proposed Building One to the adjacent parking garage is a feature that is becoming more and more popular for apartment complexes, some of which now have the parking structure built first and the dwelling units built around it, so they are very close together.

When asked by the Hearing Examiner how he reconciles the development proposed here, which would have only office and residential uses, with the type of multi-faceted neighborhood endorsed in the Master Plan, Mr. Blumberg stated that the present proposal is microcosm of what the Master Plan described. He added that the Master Plan placed the subject property within a retail/office envelope, but he considers that more a reflection of existing conditions in 1990 than an effort to carry out the goals and objectives of the Master Plan. Tr. at 59. He noted, moreover, that a residential envelope was shown right next to the retail/office envelope that included the subject property. He also observed that the proposed development would have pathways and sidewalks connecting residential and employment centers and amenities, would be near transit, and would include MPDUs, all of which are consistent with the Master Plan’s goals. Mr. Blumberg noted that with the total number of units proposed, the subject development would include 56 MPDUs, which he described as a considerable number of affordable units in an area of the County that has so little housing. He stated that the open spaces and pathways would foster a sense of community and encourage interaction among residents, consistent with the Master Plan.

Mr. Blumberg noted that the Master Plan depicted two proposed transit stops in the area, one at Omega Drive and Fields Road, about 1,000 feet north of the subject site, and another in a nearby area recommended for residential development. He acknowledged that the Applicant’s site planner, Mr. Gang, testified that current plans for development of the Crown Farm call for consolidating these two transit stops into a single, more centrally located stop that would be farther from the subject site. He described that plan, however, as no more than a proposed development,

and he considers it appropriate to continue considering the subject site as one that would be located within 1,000 feet of a transit stop, which represents a 10 to 15 minutes walk. Tr. at 60-61. He stressed, moreover, that even if the transit stop location were moved, it would still be within 2,000 feet of the subject site, consistent with the Master Plan goal of having higher intensity uses near transit stops.

Mr. Blumberg pointed out that in addition to its objective of promoting mixed residential and employment uses, the Master Plan proposes the use of floating zones as a means of achieving its land use and design objectives. He opined that the use of the PD-44 Zone is an appropriate way to allow the subject site to meet the goals and objectives of the Master Plan. Tr. at 62.

Mr. Blumberg stated that the proposed development would also be consistent with the 1993 refinement of the County's General Plan, which identifies a harmonious balance of land uses, including a balance between housing and jobs, as one of its principal elements. He notes that a reasonable mix of housing and jobs encourages shorter commuting distances, allows residential and commercial sectors to share the tax burden, and moderates pressures on housing costs. On the other hand, an over-supply of jobs or housing can lead to traffic congestion, inequitable distribution of the tax burden, and high housing prices. Mr. Blumberg cited additional goals in the General Plan for the I-270 corridor, including developing compact, mixed-use transit serviceable centers; achieving better access for public and private services in residential areas; encouraging a sense of community identity; and protecting environmentally sound areas. He interprets this as calling for bringing housing, employment and retail uses closer together, offering a convenient, lively place to live and work – exactly what the present rezoning request proposes. Tr. at 67.

Mr. Blumberg then cited the Montgomery County Housing Policy, as stated in "Montgomery County, A Place to Call Home: the Housing Policy for Montgomery County, January 2001. This document notes that over the years, both extensive development and the County's agricultural reserve protection have reduced the amount of land available for additional

development, resulting in a need to encourage new housing construction, particularly near employment and transportation centers, with higher densities and mixed uses.

Mr. Blumberg also referred to a document entitled “Framework for Planning in the Future,” which is a working draft report that Technical Staff prepared in March, 2006. He described it as setting the stage for the next phase of planning, by presenting a vision of Montgomery County in transition from a largely auto-dependent suburb to a more urban, mixed-use form, with transit-connected centers located along shared-use boulevards and transit corridors. Mr. Blumberg noted that this document forecasts that in the next 25 years, the County will add 170,000 jobs, 94,000 housing units and 215,000 people. To accommodate this level of growth, the County will need more affordable housing and a better mix of jobs and housing. The Framework goes on to identify the biggest jobs/housing imbalance as located along the I-270 corridor, which is job-rich and housing-poor.

Turning to the development currently proposed for the Crown Farm property located across Omega Drive from the subject site, Mr. Blumberg stated that the proposal calls for about 2,000 dwelling units and over 300,000 square feet of commercial development. He opined that this would feed into the development of the I-270 corridor and provide the critical mass necessary to justify implementing the Master Plan’s recommendation for a transit way to connect the two sides of the highway. Tr. at 71-72. Mr. Blumberg stated that the retail components of the proposed Crown Farm development would be an amenity for residents of the development proposed here, similar to the existing retail, entertainment and restaurant uses in the nearby Washingtonian Center.

Mr. Blumberg then addressed the specific requirements of the PD Zone, starting with Section 59-C-7.12. This section states that no land may be classified under the PD Zone “unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher.” Code § 59-C-7.12. Mr. Blumberg noted that the subject property currently has the same C-2 zoning classification that it had when the Master Plan was adopted in 1990. The C-2 Zone does not permit residences as of right, but does

permit them as a special exception. Mr. Blumberg then reviewed the specific conditions that must be satisfied before a special exception for housing in a commercial zone may be granted, which include a finding that the proposed dwellings would be compatible with existing or planned developments on the same lot or tract, as well as with the surrounding area. The specific conditions allow dwellings either independently or in combination with proposed or existing office, retail, or industrial development. The dwellings must satisfy the development standards of the underlying zone, and must be limited to a base density of six dwelling units per acre (additional density, up to 21.5 units per acre, is permitted with productivity housing). Based on the availability of a special exception to permit housing in the C-2 Zone at a density greater than two dwelling units per acre, Mr. Blumberg opined that the present application satisfies Section 59-C-7.12. Tr. at 74-76.

In response to questioning by the Hearing Examiner, Mr. Blumberg conceded that when the Master Plan was adopted in 1990, the C-2 Zone did *not* permit dwellings, even by special exception. He argued, however, that when the Council amended the Zoning Ordinance in 1994 to permit dwellings in the C-2 Zone by special exception, it did so with full knowledge that properties that were already classified under the C-2 Zone could take advantage of this special exception. Mr. Blumberg suggested, moreover, that it is possible that master plan guidance may have given the Council the impetus to create this avenue for the construction of housing in commercial zones. Tr. at 77.

Mr. Blumberg stressed that the Zoning Ordinance does not limit the application of the PD Zone to properties that are specifically designated for the PD Zone in a master plan. He noted that several zones do require a specific master plan designation – the MXTC Zone, the RNC Zone, all the CBD Zones, and the Life Sciences Center Zone – but the PD Zone is not among them.

Mr. Blumberg next addressed Section 59-C-7.14, which states that density of development under the PD Zone “is based on the area shown for residential use on the master plan.” He opined that the “Dwellings” special exception under the C-2 Zone makes the subject site

eligible for PD zoning under this provision. Tr. at 83. He also argued that the density permitted under the PD Zone should not be limited to that allowed under the C-2 special exception for dwellings, because that would be contrary to the intent of the PD Zones. He drew a comparison to a property zoned R-90, whose owner might seek reclassification to the PD Zone with 11 units per acre. Mr. Blumberg suggested that if 11 units per acre is appropriate for the area, the rezoned property should not be limited to the density permitted under the previous R-90 zoning. He emphasized that when a property is reclassified to the PD Zone, the permitted density is what the Council finds to be appropriate and compatible, not what was permitted under the previous zoning.

Considering a different measure of density, Mr. Blumberg opined that the requested PD-44 zoning would be appropriate because the development plan limits the project to a Floor Area Ratio ("FAR") of 1.5, which is the highest density permitted in the C-2 Zone. He stated that this limitation, which was recommended by Technical Staff and the Planning Board, would ensure compatibility with the existing buildings in the Office Park.

Mr. Blumberg testified that he would consider the facts of LMA No. G-803, in which the Council granted a reclassification to the PD Zone for property that was previously split zoned, part R-200 and part C-1, similar to the present case. He noted that the applicable master plan did not specifically recommend the PD Zone for the property at issue in G-803, nor did it recommend residential use of the portion of the property zoned C-1.

Mr. Blumberg observed that one portion of the Office Park was rezoned to permit a hotel. That area, at the corner of Omega Drive and Research Boulevard, abuts the subject site on two sides, and is currently the site of an extended-stay hotel. Mr. Blumberg described this use as adding a residential element to the office park that is very similar in use and intensity to the development proposed in this case. Mr. Blumberg conceded that a hotel is normally considered a commercial use, but he argued that it also has a residential element. [Applicant's counsel noted that hotels are listed as a residential use category in the permitted use table for the C-2 Zone.]

Finally, Mr. Blumberg turned to the purpose clause of the PD Zone. He reiterated that the proposed development would implement the general plan and the Master Plan by permitting unified development at a density consistent with those plans. This conclusion, he argued, is supported by the commitment to a maximum FAR of 1.5. Mr. Blumberg noted that adding a residential component to the Office Park would bring activity to the site during evenings and weekends, when it is currently very quiet. This would add vitality to the area and help implement the Master Plan objective for mixed-use development.

Mr. Blumberg opined that the proposed development would satisfy the purpose of the zone to encourage social and community interaction among those who live and work in the area, as well as a distinct visual character for the development, since the buildings would be compatible with the existing office buildings, but with their own residential elements. The design of the development would allow people to live and work in the same block, and would facilitate interaction among residents using the outdoor spaces. He noted that grading would be minimized, per Mr. Clapsaddle's testimony, and that the open space areas would provide a sense of entry and a sense of residential environment. He noted the comprehensive pedestrian circulation network that already exists on the site, and the proximity to a transit stop and area sidewalks, all of which would encourage pedestrian activity. Regarding the purpose clause element stating a preference for large developments, Mr. Blumberg stated that the proposed development should be considered part of an integrated development within the existing Office Park, and also as part of the R&D Village and the larger development potential for the Crown Farm and the Washingtonian Center.

In response to a question from the Hearing Examiner, Mr. Blumberg defended his definition of the surrounding area for this application, which differed in some respects from Technical Staff's definition. He stated that the neighborhood as he defined it is the same neighborhood that was used in connection with the rezoning of the property that now houses the extended-stay hotel adjacent to the subject site, in LMA No. G-740. Mr. Blumberg believes it is appropriate to include part of the Crown Farm property in the surrounding area, because there is a

relationship between the subject property and both the Crown Farm and the Washingtonian Center. Mr. Blumberg considered the surrounding area identified by Technical Staff to be too restrictive.

6. Bruce Lane, applicant's representative. Tr. at 97-98.

Mr. Lane is executive vice president of Meridian Group, an affiliate of the Applicant. He testified concerning the availability of parking in the parking structure next to proposed Building One, noting that the adjacent office building uses only about half of the available parking spaces. He stated that the Applicant intends to set aside 252 spaces on the north side of the building for residents of Building One. Based on the current office building usage, that would leave an additional 100 parking spaces empty.

V. ZONING ISSUES

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term "Euclidean" zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development such as permitted uses, lot sizes, setbacks, and building height. In the State of Maryland, a property owner seeking to reclassify his or her property from one Euclidean zone to another bears a heavy burden to prove either a change in circumstances or a mistake in the original zoning. See *Stratakis v. Beauchamp*, 268 Md. 643, 652-53 (1973).

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular type of use, with land use regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, *i.e.*, it satisfies the purpose clause and requirements for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

PD (Planned Development) zones are a special variety of floating zone with performance specifications integrated into the requirements of the zone. These zones allow considerable design flexibility if the performance specifications are satisfied. The applicant is not bound to rigid design specifications, but may propose site-specific specifications, within the parameters established for the zone, for elements such as setbacks, building heights and types of buildings. These specifications are set forth on a development plan to facilitate appropriate zoning oversight by the District Council. Pursuant to Code §59-D-1.11, development under the PD Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the PD Zone. Once it is approved, the development plan provides the design specifications for the site, much as the Zoning Ordinance provides design specifications for more rigidly applied zones. Accordingly, the evaluation of zoning issues must begin with the development plan and proceed to the requirements of the zone itself.

A. The Development Plan

Before approving a development plan, the District Council must make five specific findings set forth in Code § 59-D-1.61. These findings relate to consistency with the master plan and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas. The required findings are set forth below in the order in which they appear in the Zoning Code, together with grounds for the Hearing Examiner's conclusion that the evidence in this case does not support some of the required findings.

- (a) *That the zone applied for is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies.***

The first sentence of the purpose clause for the PD Zone establishes consistency with the master plan as an important factor in applying the zone:

It is the purpose of this zone to implement the general plan for the Maryland-Washington Regional district and the area master plans by permitting unified development consistent with densities proposed by master plans.

The density category indicated on the applicable master plan has special status in a PD Zone. If the District Council desires to grant reclassification to a PD Zone with a density category *higher* than that indicated on the applicable master plan, such action requires the affirmative vote of at least six members of the District Council. Code §59-D-1.62. One of the problems with the present application is that the Master Plan does not make a residential density recommendation for the subject site – it recommends commercial use, and therefore is silent with regard to residential density. The density of development proposed in this case is limited, by textual binding element, to a Floor Area Ratio (“FAR”) of 1.5. FAR is a measure of density commonly used for non-residential development. The more commonly used measure for residential density, and the only one cited in the Zoning Ordinance, is dwelling units per acre. The Master Plan could be construed, however, as Applicant argues, to recommend residential use as well as commercial, because the zone recommended in the Master Plan was later amended to allow dwellings as a special exception. The “Dwellings” special exception is limited, however, to a base density of six dwelling units per acre¹⁰. If the District Council elects to grant the requested rezoning on the basis of the Dwellings special exception under the C-2 Zone, the Hearing Examiner would advise adherence to the six-vote rule, because the density sought (base density of 44 dwelling units per acre, with a total of 56 d.u./acre including MPDU bonus) is considerably higher than the density the special exception would permit.

Moving on to the use and density recommended in the Master Plan, both the Planning Board and Technical Staff found that the proposed development conforms to the recommendations of the *1990 Approved and Adopted Shady Grove Study Area Master Plan*. Applicant’s land planner reached the same conclusion. The question of substantial compliance with the Master Plan is a close one in this case, and arguments can be made in both directions.

After a close examination, for the reasons outlined below, the Hearing Examiner concludes that the proposed development would not be in substantial compliance with the use and density indicated in the Master Plan.

1. Use Recommendations

The text of the Master Plan does not make any specific reference to the Office Park or the subject property. Community-Based Planning Staff reports that the preliminary plan and site plan approvals for the Office Park were granted while the Master Plan was being prepared, and, therefore, the drafters had every expectation that the subject site would be developed for office use as part of the Office Park build-out. Accordingly, the Office Park and the subject site are depicted on a series of Master Plan maps as committed office development in the C-2 Zone.¹¹ On every map or drawing where the use of the subject site could be shown, the Master Plan has indicated office use.

It is true that the proposed development would further one of the Master Plan's general objectives -- increasing the County's housing stock, with an appropriate mix of affordable housing. This, however, is a very broad objective that is undoubtedly part of every master plan in the County. If contributing to the County's housing stock were sufficient to demonstrate master plan compliance, that would be a test every residential development would pass. In the Hearing Examiner's view, substantial compliance requires that a development proposal comply with the essential recommendations and objectives of a master plan. Here, the Master Plan recommended a pattern of land uses with some areas for employment use, some for residential use, and some for mixed residential, commercial/retail and employment. This

¹⁰ Density may be increased to as much as 21.5 d.u./acre, but only with 35 percent productivity housing.

¹¹ The Master Plan's "Development Profile" map identifies the Office Park, including the subject site, as an "Existing/Committed Development" site. See *id.* at 16-17. The Land Use Map (Figure 5.1), which builds on the conceptual recommendations of Figure 4.2, shown on page 26 above, recommends the Office Park (and the subject site) for office use. See *id.* at 49. Similarly, the Office Park (and the subject site) are shown in an area of C-2 zoning, with a small sliver of O-M zoning along Omega Drive, on the Master Plan's "Zoning at the Time of Master Plan Adoption" map (Figure 6.1) and its "Recommended Base Zones" map (Figure 6.2). See *id.* at 74, 76. Although the Master Plan recommends the PD Zone as an optional zone for an area just west of the subject site, the subject site is not recommended for an optional zone. See "Properties Proposed for Optional Zones" map (Figure 6.3), *id.* at 77.

pattern is best seen on the Zoning and Highway Plan, which specifically designates six areas for mixed-use development: four very large tracts, with hundreds or perhaps thousands of acres, and two tracts that are smaller than the Office Park. The subject site's role in the land use pattern recommended in the Master Plan is as part of the Office Park, one of many areas designated solely for employment uses.

The Master Plan's maps are, of course, presented in conjunction with its written objectives. As noted in Part II.F above, the Master Plan's first land use objective is to provide a comprehensive transit system, and the second is to encourage a mix of employment uses and densities. The prominence of these objectives is reflected in the Land Use and Design Concepts diagram, Figure 4.2, and the Land Use Plan, Figure 5.1, both of which allocate at least half of the land in the study area to employment uses.

The third objective is to provide for "a broad mix of residential units, including affordable housing." Master Plan at 23. This objective is phrased in terms of providing a *mix* of residential units, not just increasing the number of housing units in the study area. Moreover, the text describing this objective proposes a land use pattern with a variety of housing types mixed within each residential neighborhood. Immediately following is the fourth objective, to create "identifiable residential and employment neighborhoods," with elements that foster a sense of place and a sense of community: a mix of retail, office and housing uses; an interconnected street system; diversity of housing types; street oriented buildings; and a mix of active and passive open space areas. *Id.* at 25. Read together, the third and fourth objectives call for developments that will be identifiable as neighborhoods, with a variety of housing types, because they have features that foster a sense of community. These objectives anticipate developments of a fairly substantial size, large enough to accommodate a mix of dwelling types, retail and office uses, and active and passive open space areas.

The Hearing Examiner notes that the Master Plan considered measures that might have corrected an imbalance in the jobs/housing ratio by discouraging additional

employment and encouraging more housing. Such measures were rejected for three reasons: so that the study area could continue to take maximum advantage of its attractiveness to R&D; to avoid development of primarily high-rise apartments, which would undercut Master Plan objectives to provide a mix of housing types; and because the Gaithersburg Policy Area as a whole had a significantly lower ratio of jobs to housing than the study area. See Master Plan at 53. This is not a Master Plan with housing as its primary objective. Housing is important, to be sure, but the overall vision focuses at least as much on employment uses as on housing.

The Applicant has clearly strived to design the proposed development with the sense-of-community elements identified in the Master Plan in mind. It has only one type of housing, and lacks a retail element (impractical due to the small size of the development), but it does provide for an interconnected street system and open spaces (seating areas, gazebo, forest, sidewalks), which would be accessible to both workers and residents. The buildings would be close to the internal streets within the development, although the Office Park as a whole is oriented towards parking lots, rather than streets. The layout would foster pedestrian activity and interaction to some degree, by creating open spaces where people might like to walk or sit. For residents, the pool would be another pedestrian destination. Thus, the proposed development would partially match the neighborhood vision espoused in the Master Plan. Its inability to do so fully, due to its size and the fact that most of the land around it is already developed, is perhaps symptomatic of the difficulty of trying to apply a “planned development” zone to fill in empty space in a development that was *actually* planned many years before, with a different use in mind.

Applicant argues, with support from the Planning Board and Technical Staff, that the subject site should be considered to have a master plan recommendation for residential use because, four years after the Master Plan was adopted, the County Council amended the Zoning Ordinance to permit “Dwellings” in the C-2 Zone by special exception. Legislative history from this action indicates that the Council was aware that the amendment would apply to

land then-classified under the C-2 Zone, such as the subject property, so the Council can be charged with the knowledge that it was expanding the uses permitted in areas that had been zoned C-2 pursuant to master plan recommendations. See Ex. 46. (Legislative history also tells us that the Planning Board was split 2 to 2 on this amendment, and that Technical Staff opposed the amendment for several reasons, including a concern that master plan land use recommendations would be undermined. See *id.*) The Hearing Examiner is not persuaded that a later-adopted amendment to the C-2 Zone should be considered to affect the Master Plan's recommendations. The drafters of the Master Plan, and the Council and Planning Board in approving and adopting it, recommended a zone for the subject property that did not permit residential use – that recommendation can be changed only by amending the Master Plan, not by a zoning text amendment.

2. Density Recommendations

Even if a later decision to allow dwellings in the C-2 Zone were considered to effectively “amend” the recommendation of the Master Plan to include dwellings on the subject site, the density permitted under the “Dwellings” special exception is far lower than the density Applicant seeks in this case. The “Dwellings” special exception permits a base residential density of six units per acre, which may be increased up to 21.5 units per acre if at least 35 percent of the units are productivity housing, for households with incomes at and below the area-wide median income. Code § 59-G-2.36.2(b)(2).¹² The development proposed here would have a base density more than twice as high, 44 units per acre, with a total density of 56 units per acre including MPDU bonus. See Staff Report at 11. Moreover, where the Master Plan did recommend residential uses, the highest densities recommended in the entire study area were 20 to 25 units per acre, more in keeping with the “Dwellings” special exception than with the density sought by Applicant. See Zoning and Highway Plan, Figure 6.4.

¹² Additional restrictions apply, including a compatibility requirement, a limit on how much land in a planning area may be developed under this special exception, a 50-foot height limit, and a requirement to meet the development standards of the zone with regard to setbacks, green area and lot coverage.

Applicant argues that to determine the density recommended by the Master Plan, the District Council should consider the density permitted in the C-2 Zone, which is 1.5 FAR, rather than the residential density permitted in the “Dwellings” special exception. Applicant has committed, by textual binding element, to limit the density of the proposed development to 1.5 FAR. However, density expressed in terms of FAR, which relates directly to building size and configuration, is different from units per acre, which the Hearing Examiner views as limiting the level of activity on a site by setting a cap on the number of homes. The Master Plan does not provide a residential density recommendation for the subject site, and the only indications we have of what residential density the Master Plan recommended in the area point to a maximum of 20 to 25 units per acre – the density that was recommended for an area immediately confronting the subject site across Omega Drive. As a result, the Hearing Examiner concludes that a density twice that high cannot be considered to substantially comply with the Master Plan.

3. Past Council Decision

The Planning Board, Technical Staff and the Applicant rely heavily on a 2003 decision of the District Council in LMA No. G-803, in which the Council approved rezoning to the PD Zone under circumstances similar to those in this case. In G-803, Applicant sought to rezone a 5-acre, split-zoned site, classified partly under the C-1 Zone and partly under the R-200 Zone, to the PD-9 Zone.¹³ The property was located on Georgia Avenue in the Olney Town Center. The applicable master plan maps recommended no change in the zoning of the subject property. Based on the fact that part of the site was zoned and recommended for residential use, and on an unusually high degree of consistency between the proposed development and other master plan objectives for the Olney Town Center, the District Council concluded, consistent with the undersigned Hearing Examiner’s recommendation, that the development proposed in that case would be substantially consistent with the Olney Master Plan.

¹³ The Hearing Examiner hereby takes official notice of the Hearing Examiner’s Report and Recommendation in G-803 and the District Council’s Resolution No. 15-239, adopted June 24, 2003.

As discussed in a later section of this report, the PD Zone states that “no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher.” Code § 59-C-7.121. In assessing compliance with this requirement, the Council accepted the Hearing Examiner’s view that for the portion of the property that did not have a residential density recommendation, the required minimum of two units per acre should be considered satisfied because the moderate-intensity commercial density permitted in the C-1 Zone is more analogous to moderate-to-high density residential than to low-density residential of less than two dwelling units per acre.

None of the parties participating in LMA G-803 directly addressed the question of residential density as it pertained to the portion of the property recommended and zoned for commercial use. In the present case, in contrast, the issue was squarely raised by Technical Staff, and the Planning Board specifically relied on the reasoning described above from G-803 in making its recommendation.¹⁴ Having more closely examined the question in light of the record in the present case and the language of the PD Zone (including its requirement for a density recommendation of at least “2 dwelling units per acre,” and its statement, in Section 59-C-7.14(c), that “density of development is based on the area shown for residential use on the master plan”), the Hearing Examiner now concludes that the most legally sound interpretation is that the PD Zone may be applied only to land that is recommended for residential use, and therefore has a recommended residential density, in the applicable master or sector plan.

4. Other County Plans and Policies

Applicant presented persuasive evidence that the proposed development would be consistent with the 1993 refinement of the County’s General Plan, which identifies a harmonious balance of land uses, including a balance between housing and jobs, as one of its

¹⁴ The only member of the Planning Board who dissented from the approval recommendation in this case, Meredith Wellington, stated that she does not believe the precedent established in LMA G-803 should be further promulgated. See Ex. 34 at 2.

principal elements; with the County's Housing Policy, which encourages new housing construction with higher densities and mixed uses, particularly near employment and transportation centers; and with current planning trends at the MNCPPC, as expressed in the Technical Staff's March 2006 report, "Framework for Planning in the Future."

5. Conclusion

In sum, the Hearing Examiner finds that the PD Zone can be granted only if (i) the subject property is recommended in the applicable master plan for residential use, with a density of at least two dwelling units per acre, and (ii) the proposed development would be in substantial compliance with the use and density recommended in the master plan. Making that determination in this case involves a three-part analysis:

1. Is the subject property recommended for residential use in the Master Plan, based on the provision for dwellings in the C-2 Zone as a special exception?

2. If the subject property is considered to have a residential use recommendation in the Master Plan, what residential density should the Master Plan be considered to recommend – the base density of six units per acre permitted under the Dwellings special exception, the maximum of 21.5 units per acre permitted under the special exception with 35 percent productivity housing, or the 1.5 FAR permitted for commercial uses under the C-2 Zone?

3. Would the proposed development be in substantial compliance with the use and density indicated in the Master Plan?

All parties agree that the proposed use would be inconsistent with the Master Plan's specific recommendations for the subject property. The Planning Board and Technical Staff, whose views regarding Master Plan compliance normally are entitled to great weight, feel that substantial compliance can be found because the Master Plan generally supports mixed-use development in the I-270 corridor. See Ex. 34. They also believe that the precedent established in LMA No. G-803 should be followed, allowing commercial densities to be applied

to the residential density requirements of the PD Zone. Nonetheless, for the reasons discussed in Part V. A.(a) above, the Hearing Examiner concludes that (i) the subject site is recommended for commercial use in the Master Plan, and therefore is not eligible for reclassification to the PD Zone; (ii) if the subject site were considered recommended for residential use by virtue of the Dwellings special exception, that recommendation carries with it a density recommendation of no more than 21.5 units per acre, less than half the density proposed in this application; and (iii) although the proposed development would promote some of the Master Plan's objectives and could be considered to comply with its general goals, it would not substantially comply with the use and density indicated for the subject site.

The testimony of Applicant's land planner and the favorable recommendations of the Planning Board and Technical Staff demonstrate that the proposed development would be consistent with the General Plan, the County's Housing Policy, and the current planning outlook of the County's experts. If this application sought reclassification to a zone that did not specifically require substantial compliance with the applicable master plan, and did not require a development plan – which triggers the specific requirement for substantial compliance with the use and density indicated by the master plan – the undersigned would undoubtedly recommend approval of this application on grounds that the proposed development would be consistent with the current vision for the area held by the Planning Board and Technical Staff and with some of the Master Plan's objectives. However, the undersigned believes that the better legal approach is to seek the most reasonable interpretation of the Zoning Ordinance and the Master Plan. In the Hearing Examiner's view, the most reasonable interpretation of the relevant provisions calls for denial of this application.

- (b) ***That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.***

1. Purposes of the Zone

The purpose clause for the PD Zone, found in Code §59-C-7.11, is set forth in full below, with relevant analysis and conclusions for each paragraph following.

It is the purpose of this zone to implement the general plan for the Maryland-Washington Regional District and the area master plans by permitting unified development consistent with densities proposed by master plans. It is intended that this zone provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses and optimum land planning with greater efficiency, convenience and amenity than the procedures and regulations under which it is permitted as a right under conventional zoning categories. In so doing, it is intended that the zoning category be utilized to implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories.

It is further the purpose of this zone that development be so designed and constructed as to facilitate and encourage a maximum of social and community interaction and activity among those who live and work within an area and to encourage the creation of a distinctive visual character and identity for each development. It is intended that development in this zone produce a balance and coordinated mixture of residential and convenience commercial uses, as well as other commercial and industrial uses shown on the area master plan, and related public and private facilities.

It is furthermore the purpose of this zone to provide and encourage a broad range of housing types, comprising owner and rental occupancy units, and one-family, multiple-family and other structural types.

Additionally, it is the purpose of this zone to preserve and take the greatest possible aesthetic advantage of trees and, in order to do so, minimize the amount of grading necessary for construction of a development.

It is further the purpose of this zone to encourage and provide for open space not only for use as setbacks and yards surrounding structures and related walkways, but also conveniently located with respect to points of residential and commercial concentration so as to function for the general benefit of the community and public at large as places for relaxation, recreation and social activity; and, furthermore, open space should be so situated as part of the plan and design of each development as to achieve the physical and aesthetic integration of the uses and activities within each development.

It is also the purpose of this zone to encourage and provide for the development of comprehensive, pedestrian circulation networks, separated from vehicular roadways, which constitute a system of linkages among residential areas, open spaces, recreational areas, commercial

and employment areas and public facilities, and thereby minimize reliance upon the automobile as a means of transportation.

Since many of the purposes of the zone can best be realized with developments of a large scale in terms of area of land and numbers of dwelling units which offer opportunities for a wider range of related residential and nonresidential uses, it is therefore the purpose of this zone to encourage development on such a scale.

It is further the purpose of this zone to achieve a maximum of safety, convenience and amenity for both the residents of each development and the residents of neighboring areas, and, furthermore, to assure compatibility and coordination of each development with existing and proposed surrounding land uses.

This zone is in the nature of a special exception, and shall be approved or disapproved upon findings that the application is or is not proper for the comprehensive and systematic development of the county, is or is not capable of accomplishing the purposes of this zone and is or is not in substantial compliance with the duly approved and adopted general plan and master plans. In order to enable the council to evaluate the accomplishment of the purposes set forth herein, a special set of plans is required for each planned development, and the district council and the planning board are empowered to approve such plans if they find them to be capable of accomplishing the above purposes and in compliance with the requirements of this zone.

1st paragraph: Master Plan implementation. As discussed under (a) above, the proposed development would promote some of the Master Plan's objectives, but it does not comply with the Master Plan's specific recommendations for this site. Moreover, the Master Plan does not provide any recommendation for appropriate residential density on the site, and residential density recommendations for nearby sites are less than half the level of density proposed in this application. The proposed development would be consistent with the County's General Plan and Housing Policy, but these are not enough to outweigh the Master Plan. Accordingly, the Hearing Examiner concludes that the proposed development would not permit "development consistent with densities proposed by" the Master Plan, nor would it "implement the general plan, area master plans and other pertinent county policies in a manner and to a degree more closely compatible with said county plans and policies than may be possible under other zoning categories."

Second paragraph: social and community interaction, distinctive visual character, balanced mix of uses. As Technical Staff and the Applicants' land planner found, the proposed development would achieve these objectives in several ways. The development would have a distinctive visual character because of textual binding elements regarding streetscape and open space, and because the new residential buildings would be well-integrated into the Office Park but have their own residential elements. The development's walkways and open spaces would encourage social and community interaction and activity among residents and workers in the area. The development would contribute to a balanced mix of uses in the area by adding housing to a job-heavy region

Third paragraph: broad range of housing types. The proposed development would provide two types of housing: market rate and MPDU multi-family units. Due to the relatively small size of the site, incorporating additional types of housing might have been challenging. Moreover, the large scale and bulk of multi-family buildings would be compatible with the existing office buildings in a way that would be difficult to achieve, on a relatively small site, with other types of housing. Accordingly, this requirement would be adequately satisfied.

Fourth and fifth paragraphs: trees, grading and open space. The proposed development would preserve a small existing forested area (0.44 acres) and extend it, adding 0.72 acres of forest, all of which would be subject to a conservation easement. It would also preserve several large trees scattered throughout the property. In addition, the development would create a green open space and seating area on the site of an unused bank building, which would be adjacent to the conservation area and accessible for both employees and residents, as well as visitors to the site.

The subject site is part of a tract that is has been graded for office development, so it already very level. The Development Plan would minimize additional grading by making use of an existing parking garage, putting the other major parking facility underneath the footprint

of one of the new buildings, and using an off-site, regional stormwater management facility for quantity control.

Sixth paragraph: pedestrian networks. Pedestrian activity would be encouraged by a network of pedestrian sidewalks linking the proposed residential buildings with one another, the existing office buildings, the open space and recreation areas, and the nearby public sidewalks. Extensive retail, entertainment and dining opportunities are available at the nearby Washingtonian Center. More and closer opportunities will be available close by if the Crown Farm property is developed as currently proposed. The subject site is within 1,000 to 2,000 feet of two sites that have been proposed for transit stops, so it will have excellent access to public transportation if the transit way recommendations of the Master Plan are implemented. Currently, the site is served by Ride-On bus service along Omega Drive and Research Boulevard, which provides transportation to the Washingtonian Center as well as the Shady Grove Metro.

Seventh paragraph: scale. The PD Zone encourages, but does not require, development on a large scale. While not large in an absolute sense, the proposed development would aggregate enough parcels to satisfy the Master Plan's specific size recommendation for PD zoning.

Eighth paragraph, first part: safety, convenience and amenity. The evidence demonstrates that the proposed development would provide safe and convenient roadways, sidewalks and pathways. It would provide a high degree of convenience and amenity for residents by creating opportunities to live and work in the same neighborhood, and to live in a pedestrian-friendly location, near retail, entertainment and dining opportunities, with open spaces for green relief and on-site recreation.

Eighth paragraph, second part: compatibility. The Hearing Examiner is persuaded that, setting aside the Master Plan density issue, the proposed development would be compatible with existing uses in the surrounding area. Within the Office Park, the proposed

residential buildings would be similar in scale, bulk and materials to the existing office buildings, and would be well-integrated into the relationships among the buildings, roads, sidewalks and open spaces. The residential uses would enliven the Office Park, changing it from a site that is has very little activity outside the weekday daytime hours to one with substantial activity seven days at week, during the evening hours as well as daytime. The evidence amply demonstrates that the proposed development would not result in any access or parking problems for the existing office buildings. There is no evidence to suggest any adverse impacts on the hotel at the corner of Omega Drive and Research Boulevard, which might get some customers from friends and relations of the new residents. Moreover, the additional residents in an area that is job-heavy would benefit other businesses in the surrounding area, by providing them with potential employees and customers close by.

Ninth paragraph: three findings. The purpose clause states that the PD Zone “is in the nature of a special exception,” and shall be approved or disapproved based on three findings:

- (1) the application is or is not proper for the comprehensive and systematic development of the county;
- (2) the application is or is not capable of accomplishing the purposes of this zone;
and
- (3) the application is or is not in substantial compliance with the duly approved and adopted general plan and master plans.

On the Hearing Examiner’s reading, this element of the purpose clause does not add new requirements, but reminds the District Council of its responsibility to carefully consider whether the PD Zone would be appropriate in the location for which it is requested. The conclusions drawn earlier in this section govern the findings to be made here. Based on the preponderance of the evidence and for the reasons stated above, the Hearing Examiner concludes that present application is not proper for the comprehensive and systematic development of the County due to a lack of Master Plan compliance; is not in compliance with or

capable of accomplishing all of the purposes of the zone; and is not in substantial compliance with the Master Plan.

2. Standards and Regulations of the Zone

The standards and regulations of the PD-44 Zone are summarized below, together with the grounds for the Hearing Examiner's conclusion that the proposed development would satisfy many, but not all of these requirements.

Section 59-C-7.121, Master Plan Density. Pursuant to Code §59-C-7.121, "no land can be classified in the planned development zone unless such land is within an area for which there is an existing, duly adopted master plan which shows such land for a density of 2 dwelling units per acre or higher." The subject property is recommended in the Master Plan for office use in the C-2 Zone. The Master Plan neither recommends the site for residential use nor provides guidance as to an appropriate residential density. For the reasons discussed in Part V.A.(a)2. above, the Hearing Examiner concludes that this fatal flaw cannot be cured by the fact that since 1994 (four years after adoption of the Master Plan), the C-2 Zone has permitted residential uses by special exception, with a density greater than two units per acre. For the reasons stated in Part V.A.(a)5.. above, the Hearing Examiner further concludes that the commercial density permitted in the C-2 Zone, in terms of FAR, should not be used as a proxy for the density requirement of this section, which is expressed in residential terms.

Section 59-C-7.122, Minimum Area. Code §59-C-7.122 specifies several criteria, any one of which may be satisfied to qualify land for reclassification to the PD Zone. The subject application satisfies the first of these criteria:

That it contains sufficient gross area to construct 50 or more dwelling units under the density category to be granted.

Applicant proposes to construct 371 dwelling units on the subject site.

Section 59-C-7.131, Residential Uses. Pursuant to Code §59-C-7.131, all types of residential uses are permitted, within certain parameters. For a PD-44 development with more than 200 units, at least 25 percent of the units must be in buildings with four stories or less, and

at least 50 percent must be in buildings with more than four stories. The Development Plan in this case does not specify building heights, beyond a maximum height of 70 feet, but it does address this requirement by stating that 35 percent of the units would be in Building Two, which testimony indicated would have four stories, and 65 percent would be in Buildings One and Three, which testimony indicated would have six and five stories, respectively. Taken together, the Hearing Examiner finds that these elements satisfy the requirements of this section.

Section 59-C-7.132, Commercial Uses. Commercial uses are permitted but not required under the PD Zone. Parameters established for commercial uses are not applicable to the subject application, which is limited to residential uses.

Section 59-C-7.133, Other Uses. Noncommercial community recreational facilities for the use of residents, such as the swimming pool, are permitted in the PD Zone. No other non-residential uses are proposed.

Section 59-C-7.14, Density of Residential Development. The Zoning Ordinance provides the following direction for the District Council in considering a request for the PD Zone (§ 59-C-7.14(b)):

The District Council must determine whether the density category applied for is appropriate, taking into consideration and being guided by the general plan, the area master or sector plan, the capital improvements program, the purposes of the planned development zone, the requirement to provide [MPDUs], and such other information as may be relevant.

Applicant seeks the PD-44 density category. The record does not indicate the density of the only residential uses in the surrounding area, at the Washingtonian Center, so that comparison cannot be made. The proposed buildings would have an FAR no greater than the maximum in the C-2 Zone, which presumably is the FAR of the existing buildings in the Office Park, but that is a different concept from the residential density categories of the PD Zone. Moreover, as noted earlier, the Master Plan does not recommend a residential density for the subject property, but the highest residential density it recommends in the study area is 20 to 25 units per acre, which is less than half the maximum permitted in the PD-44 Zone. The only

evidence to support a determination that the proposed density would be appropriate is the favorable recommendations of the Planning Board and Technical Staff. Neither the Planning Board nor Technical Staff addressed the question of the appropriate *residential* density, relying, instead, on findings that setting maximum FAR equal to that of the surrounding commercial zone would be enough to ensure compatibility. As discussed earlier, the Hearing Examiner is not persuaded that this comparison can properly be made. Accordingly, relying on the Master Plan, the Hearing Examiner concludes that the density proposed is excessive.

Section 59-C-7.15, Compatibility. This section requires that a proposed development be compatible internally and with adjacent uses. It also establishes minimum parameters for setbacks and building height that are designed to promote compatibility. As discussed in Part V.A.(b)(1) above, apart from the Master Plan density issue, the Hearing Examiner agrees with the Planning Board and Technical Staff that the proposed development would be compatible with existing development in the surrounding area. It would also satisfy the specific setback and building height provisions, as described below.

Section 59-C-7.15 of the Zoning Ordinance states that where land classified under the PD Zone adjoins land for which the area master plan recommends a one-family detached zone, no building other than a one-family detached residence may be constructed within 100 feet of such adjoining land, and no building may be constructed at a height greater than its distance from such adjoining land. In the present case, no single-family detached homes are recommended or existing on any adjoining land.

Section 59-C-7.16, Green Area. The PD-44 Zone requires a minimum of 50 percent green area. The Development Plan depicts green area equal to approximately 58 percent of the site, and a textual binding element specifies that at least 55 percent green space shall be provided.

Section 59-C-7.17, Dedication of Land for Public Use. This section requires that land necessary for public streets, parks, schools and other public uses must be dedicated to

public use, with such dedications shown on all required development plans and site plans. All necessary roadway dedications on Omega Drive and Research Boulevard were done previously, at the time of subdivision and plat recordation. No new dedications are proposed.

Section 59-C-7.18, Parking Facilities. Off-street parking must be provided in accordance with the requirements of Article 59-E of the Zoning Ordinance. As shown on the Development Plan, the proposed project would provide more than the required number of spaces.

The final two elements of finding (b), the maximum safety, convenience and amenity of the residents, and compatibility, have already been addressed.

(c) That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.

The uncontroverted evidence supports a finding that the proposed internal vehicular and pedestrian circulation systems and points of external access would be safe, adequate, and efficient. The Development Plan provides for continued use of the existing access points to the Office Park, as well as an extensive network of internal, interconnected roads and sidewalks.

(d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.

The proposed development would tend to prevent erosion of the soil and preserve natural vegetation and other natural features of the site by preserving the small forested area on the site and some of the existing trees. The site is already very level, having been graded as part of the development of the Office Park. Grading would be further minimized by using an existing parking garage to serve one building, building another parking garage

underneath the footprint of one of the new buildings, and using an off-site regional stormwater management facility for water quantity control.

The Development Plan provides for forest conservation and afforestation sufficient to satisfy applicable forest conservation requirements. Testimony and written submissions establish that the proposed development would readily satisfy water protection requirements.

- (e) ***That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.***

The Applicant has not provided such documents because it has not determined whether the project would be developed as a rental or for-sale community. Applicant's land planner represents, in a written submission, that the proposed development would be maintained and managed by a professional management company that would be responsible for the perpetual care and maintenance of all recreational, common and quasi-public areas. The Hearing Examiner considers this sufficient.

B. Public Interest

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities or the environment. For the reasons stated in Part V.A.(a) above, the Hearing Examiner concludes that while the proposed development would further some of the

Master Plan's objectives, it would not be sufficiently consistent with the Master Plan to support approval.

The evidence of record indicates that the proposed development would have no adverse effects on traffic conditions or public utilities. The evidence indicates that the proposed development would add a small number of students (about 23) to a high school that is over capacity, as that term is defined by MCPS, and is expected remain over capacity for the next several years. The Planning Board has made a finding, however, that all school clusters have adequate capacity to support subdivision approval during FY 2007. In the past, the District Council has considered such a finding sufficient to support the approval of rezoning requests, like the present application, that would add only marginally to the existing overcrowding.

The Master Plan plays a central role in the purpose clause for the PD Zones, so in this context its recommendations and objectives are entitled to particular deference. Having found that the proposed development would not be consistent with the Master Plan, the Hearing Examiner must conclude that approval of the application in its current form would not be in the public interest.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the conclusions specified below.

A. Development Plan

1. The submitted Development Plan is not in substantial compliance with the Master Plan.
2. The Development Plan does not fully comply with the purposes, standards, and regulations of the PD-44 Zone, although it would provide for a form of development that would be compatible with adjacent development in terms of use and architecture.
3. The Development Plan proposes internal vehicular and pedestrian circulation systems and points of external access that would be safe, adequate and efficient.

4. By its design and by minimizing grading, the proposed development would tend to prevent erosion of the soil and preserve natural vegetation and other natural features of the site. The application would comply with forest conservation requirements under Chapter 22A and requirements for water resource protection under Chapter 19.

5. No documents were submitted regarding the ownership and method of perpetual maintenance of areas intended to be used for recreational or other common or quasi-public purposes, but Applicant has represented that these functions will be performed in perpetuity by a professional property management company.

B. Zoning Request

Application of the PD-44 Zone at the proposed location is not proper for the comprehensive and systematic development of the County because the proposed development:

1. Will not serve the public interest;
2. Will not be in substantial compliance with the applicable master plan; and
3. Will not fully satisfy the purposes, standards and regulations of the zone.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-841, requesting reclassification from the C-2 Zone (general commercial) to the PD-44 Zone (Planned Development) of 6.92 acres of land located north and east of the intersection of Research Boulevard and Omega Drive, in the 9th Election District, be ***denied***.

Dated: August 11, 2006

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner